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rec'd June 10, 1942
Modified Opinion filed 6-8-42 ^{2/61}/₆₄
315 Ill. App.
Adm. P. 1 (2 parts, part 2) 947
7-1-42 AT A TERM OF THE APPELLATE COURT, 56

Begun and held at Ottawa, on Tuesday, the 5th day of May, in
the year of our Lord one thousand nine hundred and forty-two,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice
Hon. FRANKLIN R. DOVE, Justice
Hon. FRED G. WOLFE, Justice
E. J. WELTER, Sheriff

315 I.A. 127

BE IT REMEMBERED, that afterwards, to-wit: On June 8, 1942,
modified
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

77976

BOUND

MAR 20 '61

MAR 20 '61

Abstract

GEN. NO. 9717

AGENDA NO. 20

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
October Term, 1941

CLARENCE E. BACHELLOR and
THOMAS E. ROBINSON,

Appellees,

vs.

ALBERT DOCKTERMAN, MILO DOCK-
TERMAN and I. C. GELLMAN,

Appellants

APPEAL FROM
CIRCUIT COURT OF
ROCK ISLAND COUNTY.

DOVE, J.:

Appellants seek, by this appeal, a reversal of a decree of the circuit court of Rock Island County, in favor of appellees, setting aside as fraudulent, two deeds, one from Albert Dockterman and his wife to I. C. Gellman, and another from Gellman and his wife to Milo Dockterman, each conveying Lot 28 in Exposition Park Addition to the City of Rock Island.

The record discloses that appellees, as owners of a farm mortgage, which had been assumed by Albert Dockterman, foreclosed the mortgage in the circuit court of Whiteside County, and purchased the property at Master's sale on June 1, 1933, for \$6000.00 leaving unpaid \$2173.83 of the amount due. A deficiency judgment against Albert Dockterman for that amount was entered on June 12, 1933. A transcript of the judgment was filed in Rock Island County on June

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
October Term, 1941

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

OLIVER E. BROOKER and
THOMAS E. ROBINSON,
Appellees,
vs.
ALBERT DOCKTERMAN, also DOCK-
TERMAN and I. C. GELMAN,
Appellants

DOCK, J.:

Appellants seek, by this appeal, reversal of a decree of the circuit court of Cook County, in favor of appellees, setting aside as fraudulent, two deeds, one from Albert Dockterman and his wife to I. C. Gelman, and another from Gelman and his wife to Al-
bert Dockterman, each conveying Lot 28 in Exposition Park Addition to the City of Cook Island.

The record discloses that appellees, as owners of a farm mort-
gage, which had been assumed by Albert Dockterman, foreclosed the mortgage in the circuit court of Cook County, and purchased the property at master's sale on June 1, 1933, for \$5000.00 leaving unpaid \$2173.83 of the amount due. A deficiency judgment against Albert Dockterman for that amount was entered on June 12, 1933. A transcript of the judgment was filed in Cook County on June

19, 1933. An execution thereon was issued on September 18, 1933, and returned unsatisfied.

On the day of the foreclosure sale, June 1, 1933, Albert Dockterman and his wife executed a deed to Gellman, conveying sixteen parcels of real estate including said Lot 28, and another deed to Anna Taxman, conveying eight other parcels of real estate. These deeds were recorded the next day. Gellman and his wife conveyed said Lot 28 to Milo Dockterman by deed dated October 4, 1934, recorded the next day, October 5th. Each of the deeds is a quit claim deed, reciting a consideration of \$1.00 and other good and valuable consideration. Gellman is a brother-in-law, and Milo Dockterman is a son, of Albert Dockterman, who was in the real estate business. Anna Taxman is his niece. Albert Dockterman testified that Anna Taxman's St. Louis address is "General Delivery"; that sometimes she visits him, sometimes she goes to Florida, and that she has a lot of money. Gellman is a manufacturer, living in Rock Island.

Appellees filed a complaint on October 30, 1934, against Albert Dockterman, Anna Taxman, I. C. Gellman and his wife, to set aside the two deeds of June 1, 1933. While that suit was pending, they filed another complaint against Albert and Milo Dockterman, and Frank Zarub, an allegedly fraudulent contract purchaser from Milo, to set aside the deeds and contract as to said Lot 28 only. Gellman was not made a party defendant to the latter suit, and was denied leave to intervene. A decree setting aside the deeds and contract as to said Lot 28 was reversed by this court on account of the denial of leave to intervene and the cause was remanded. (Bachellor v. Dockterman, 291 Ill. App. 418.) The cause was redocketed in the circuit court on November 29, 1937. On December 17, 1937 Milo Dockterman re-conveyed the premises to Gellman and on January 28, 1938, Dockterman filed a motion for leave to file a supplemental answer in the nature

19, 1933. An execution return was issued on September 18, 1933, and returned unsatisfied.

On the day of the foreclosure sale, June 1, 1933, Albert Dockerman and his wife executed a deed to Gellman, conveying sixteen parcels of real estate including said lot 28, and another deed to Anna Taxman conveying eight other parcels of real estate. These deeds were recorded the next day. Gellman and his wife conveyed said lot 28 to Miss Dockerman by deed dated October 4, 1934, recorded the next day, October 25th. Each of the deeds is a quit claim deed, reciting a consideration of \$1.00 and other good and valuable consideration. Gellman is a brother-in-law, and Miss Dockerman is a son, of Albert Dockerman, who was in the real estate business. Anna Taxman is his niece. Albert Dockerman testified that Anna Taxman's St. Louis address is "General Delivery"; that sometimes she visits him, sometimes she goes to Florida, and that she has a lot of money. Gellman is a manufacturer, living in Rock Island. Appellees filed a complaint on October 30, 1934, against Albert Dockerman, Anna Taxman, I. C. Gellman and his wife, to set aside the two deeds of June 1, 1933. This fact was pending, they filed another complaint against Albert and Miss Dockerman, and Anna Taxman, to legally terminate contract purchaser from Miss Taxman, to set aside the deed and contract as to said lot 28 only. Gellman was not made a party defendant to the latter suit, and was denied leave to intervene. A decree setting aside the deed and contract as to said lot 28 was reversed by the court on account of the denial of leave to intervene and the same was remanded. (In *Callor v. Dockerman*, 291 Ill. App. 418.) The case was retried in the circuit court on November 29, 1937. On December 17, 1937, Miss Dockerman re-conveyed the premises to Gellman and on January 22, 1938, Dockerman filed a motion for leave to file a supplemental answer in the matter

of a disclaimer. Upon the redocketing of the cause, Gellman answered and the two causes were consolidated and re-referred to a special Master to take the testimony. The decree appealed from dismissed the complaint as to all the property except said Lot 28, and in addition to setting aside the two deeds mentioned, cancels, as fraudulent, the Zarub contract. Zarub did not appeal.

The record further discloses that Albert Dockterman was dealing in equities. He lost a farm in Iowa and the one in Whiteside County through foreclosure. The deeds of June 1, 1933, divested him of title to all his property, except an incumbered farm in Minnesota. It is not shown that it is of any value above the mortgage. He estimated the value of the property conveyed to Gellman at \$32,945.00, subject to taxes due and incumbrances of \$30,833.00, leaving a net value of \$2,112.00; that the value of the property conveyed to Anna Taxman was \$20,950.00, less incumbrances and taxes due amounting to \$20,322.00, leaving its net value \$628.00. He testified and claims the deeds were not made as absolute transfers, but were in the nature of second mortgages to secure indebtedness due the grantees.

Elmore A. Gripp, an attorney and the secretary of Gellman's manufacturing company, testified he acted as agent and attorney for Gellman in loaning various sums of money to Dockterman. Gripp and Dockterman testified that Gripp, as attorney for Gellman, had requested of Dockterman payment or security about six months before the deeds were made; that Dockterman brought in a list of his property, except the Whiteside County farm; and that they had several conversations about the matter. Gellman testified he did not know Dockterman had assumed liability on the Whiteside County farm mortgage. Dockterman testified he did not talk to Gellman or Gripp about transferring his property to Gellman between March and June 1, 1933, and that he

of disclaimer. Upon the rebooking of the lease, Gelman answered and the two leases were consolidated and re-referred to a special Master to take the testimony. The docket applied from dismissed the complaint as to all the property except said Lot 28, and in addition to setting aside the two deeds mentioned, cancel, as fraudulent, the lease contract. Docketman did not appeal. The record further discloses that Docketman was dealing in equities. He first went in Iowa and the one in Whiteside County through foreclosure. The record of June 1, 1933, divided him of title to all his property, except an undivided part in Minnesota. It is not shown that it is of any value above the mortgage. He estimated the value of the property conveyed to Gelman at \$28,945.00, subject to taxes due and incumbrances of \$30,833.00 leaving a net value of \$2,112.00; and the value of the property conveyed to Anna Taxman was \$25,930.00, less incumbrances and taxes due amounting to \$20,323.00, leaving a net value of \$5,607.00. He testified and claimed the deeds were not made as absolute transfers, but were in the nature of second mortgages to secure indebtedness due the grantees. Elmore A. Gripp, an attorney and the secretary of Gelman's manufacturing company, testified he acted as agent and attorney for Gelman in loaning various sums of money to Docketman. Gripp and Docketman testified that Gripp, as attorney for Gelman, had requested of Docketman payment on security about six months before the deeds were made; that Docketman admitted in a letter to Gripp, except the Whiteside County farm; no other way and several conversations about the matter. Gelman testified he did not know Docketman and assumed liability on the Whiteside County farm mortgage. Docketman testified he did not fail to Gelman or Gripp about transferring his property to Gelman between April and June 1, 1933, and that he

transferred the property on the latter date because Gripp called him to his office. He also testified he did not know when the farm was sold, but was notified it had been sold on June 1, 1933, to appellees for \$6,000.00; and that he thought he was up there and talked with the Master after it was sold, but did not remember whether he was there before the sale. The record does not show that Anna Taxman was asking for payment or security, or knew anything about the deed to her before or when it was made. Nevertheless, Dockterman conveyed all his property to her that he did not convey to Gellman except the Minnesota farm.

Gripp testified that Dockterman told him the properties listed were incumbered by delinquent taxes and mortgages; that his (Gripp's) experience gave him a knowledge of real estate values, particularly of the type conveyed by the deeds, and that he had investigated the properties, many of them by personal inspection, and his opinion was that there was very little equity in any of them, due to the fact that the mortgages were in default and the taxes and special assessments were very much delinquent. Yet, Gellman, purportedly seeking security for a debt, accepted a deed conveying only a part of the property of Dockterman to himself while the remainder of the property was conveyed to Anna Taxman, who is not shown to have known anything about the transaction, when there was very little equity in all the property, and it is claimed that Gellman's debt was \$7,350.00.

Dockterman testified he owed Anna Taxman \$1,400.00. He did not state how or when the indebtedness was incurred, and his testimony is uncorroborated. He did not testify how much he owed Gellman. Gellman testified the amount was \$7,350.00, without interest. His testimony indicates it was for loans, but neither of them testified to the date or amount of any loan. The only effort of appellants to show any loan was the following: Gripp testified that for Gellman

he loaned Dockterman \$700.00 on February 11, 1932; and that on April 24, 1933, he deposited in Dockterman's account in a Rock Island bank the sum of \$1,150.00, which was furnished by Gellman for that purpose. Gripp's check for \$700.00 to Dockterman, of the date mentioned, with the latter's endorsement and a judgment note of the same date and amount, due in twenty days, payable to Gripp, with an undated endorsement to Gellman, were introduced in evidence, together with a deposit slip showing a deposit in Gellman's account, and bearing a notation reading:

"Deposited by E. A. Gripp for I. C. Gellman to pay cks. No. 7088 and No. 7089, for Clerk of Dist. Court of Wapello County, \$800.00 and \$350.00; paid April 24, 1933, State Bank of Rock Island, Illinois."

There is no explanation of why the judgment note was made payable to Gripp; nor is it shown when the note was endorsed to Gellman. It is not shown that Gellman knew anything about the notation on the deposit slip showing the deposit was made for him. He knew of Dockterman's financial difficulties. The circumstances of the two transactions mentioned indicates he intended they should not show as loans. This is directly opposite to the usual and natural custom in making loans. The inference is that he felt that if their true character was known it would disclose Dockterman's financial situation and tend to precipitate action by his other creditors. Such transactions bear the ear marks of fraud upon such creditors.

Business men do not ordinarily make unsecured loans of \$7,350.00, even to a relative, without ascertaining his financial status. More than a year had elapsed between the \$1,150.00 transaction and the making of the deeds by Dockterman, who knew, as a party to the farm foreclosure, that it was pending. Under the law he was charged with notice of the subsequent proceedings. He admitted talking with the Master in Chancery about it, and said he did not remember whether he

he loaned Dockerman \$700.00 on February 11, 1933; and that on April 24, 1933, he deposited in Dockerman's account in a bank the sum of \$1,180.00, which was furnished by Gelman for that purpose. Gripp's check for \$700.00 to Dockerman, of the date mentioned, with the latter's endorsement and a payment note of the same date and amount, due in twenty days, payable to Gripp, with an undated endorsement to Gelman, were introduced in evidence, together with a deposit slip showing a deposit in Gelman's account, and bearing a notation reading:

"Deposited by E. A. Gripp for I. G. Gelman to pay on No. 708 and No. 7089, for check of \$700.00 and \$1,180.00, dated April 24, 1933, State Bank of Cook Island, Illinois."

There is no explanation of why the payment note was made payable to Gripp; nor is it shown when the note was endorsed to Gelman. It is not shown that Gelman knew anything about the notation on the deposit slip showing the deposit was made for him. He knew of Dockerman's financial difficulties. The circumstances of the two transactions mentioned indicates he intended they should not be as loaned. This is directly opposite to the usual and natural custom in making loans. The inference is that he felt that in their true character was known it would disclose Dockerman's financial situation and tend to precipitate action by his other creditors. Such transactions bear the earmarks of loans upon such creditors.

Business men do not ordinarily make unsecured loans of \$1,380.00, even to a relative, without ascertaining his financial status. More than a year had elapsed between the \$1,180.00 transaction and the making of the debts by Dockerman, and yet, as a party to the loan, Gripp, that it was pending. Under the law he was charged with notice of the subsequent proceedings. He admitted thinking with the Master in Ghana by about it, and said he did not remember whether he

was there before the foreclosure sale. What purpose he could have had in visiting the Master, in another county, other than to inform himself of the status of the proceeding, is not suggested. While Gellman testified he did not know Dockterman had assumed and agreed to pay the farm mortgage, it is significant that he did not testify he did not know the foreclosure decree held Dockterman liable for the debt, or that the farm was to be sold under the foreclosure on the day the deeds were made.

No effort was made to show the amount due on the alleged loans at the time Dockterman made the deeds. Gellman testified he had turned over to his attorney the documents to show what money was loaned. None of the alleged documents were produced, except those concerning the \$700.00 and the \$1500.00 transactions. Appellants claim the deeds were made as mortgages. If Gellman had documents showing the alleged loans, the amount due when the deeds were made would be a mere matter of a few minutes computation. There had been several conversations pertaining to the transfer, at one or more of which Gellman was present. There is no explanation of why a deed, instead of a mortgage, was made. If, as Gellman and Dockterman claim, the deed to Gellman was intended as a mortgage, there could be no advantage in taking a deed, for, in the event of a default, Dockterman could require Gellman to foreclose, in the same manner as if a mortgage in form had been taken. All these facts, when considered with the deeding of the property on the day of the foreclosure sale, tend to show that Gellman and Dockterman knew the status of the farm foreclosure when the deeds were made, and strongly indicate their purpose and attempt to induce Dockterman's other creditors to believe from the deeds that Gellman and Anna Taxman were purchasers of the property, and to put it beyond the reach of such creditors.

Dockterman testified he sold six or seven of the properties deeded, and told Gellman and Anna Taxman to "sell maybe, seven pieces;" that Anna Taxman sold four pieces; that mortgages on

was there before the foreclosure sale. But because he could not
had in visiting the house in another county, other than the father
himself of the estate of the deceased, he not suggested. Wife
Gelman testified he did not know Bookstaver had signed and agreed
to pay the first mortgage, it is significant that he did not testify
he did not know the foreclosure sale he held Bookstaver in the for
the debt, or that the farm was so sold under the foreclosure on
the day the debt was made.

No effort was made to show the amount due on the first mortgage
at the time Bookstaver made the deed. Gelman testified he had
turned over to his attorney the documents for some time money was
loaned. None of the alleged documents were shown, except those
concerning the \$700.00 and the \$100.00 promissory note. Appellants
claim the debt was made as a gift. If Gelman had a complete
knowing the deed to him, the court would have the debt was made
under of a mere matter of a few minutes conversation. There had been
several conversations pertaining to the property, at one or more of
which Gelman was present. There is no evidence of any deed,
instead of a mortgage, was made. If, as Gelman and Bookstaver claim,
the deed to Gelman was intended as a mortgage, there would be no
advantage in taking a deed, for, in the event of a default, the lender
could require Gelman to foreclose, in the same manner as if a mort-
gage in form had been taken. All the same, it was considered with
the meaning of the property on the day of the foreclosure sale, and
to show that Gelman and Bookstaver were the parties to the farm
foreclosure when the deed was made, and that the deed was made for the
purpose and intent to induce Bookstaver to transfer the property to the
lender from the state that Gelman and Bookstaver were partners
of the property, and so that it should be a reason for the foreclosure
Bookstaver testified he told his son about the property. This
deeded, and told Gelman he was known to Bookstaver, even
pleased; that when Bookstaver sold the property, that was the

eleven pieces were foreclosed, six pieces were sold on contract, three were deeded to a bank to prevent deficiency decrees, two were still held in Anna Taxman's name, and that he was collecting the rents for Gellman and paying the taxes on those still in Gellman's name; and that he had a book showing his collections and disbursements. He did not produce the book or say what he did with the proceeds of the property sold by him or with the rents collected. The testimony was closed more than five and one-half years after the deeds were made. It is not shown that any of the money received by Dockterman during that period was ever applied on the alleged debts to Gellman or Anna Taxman, or that he ever accounted to either of them in any way, or that Anna Taxman ever received or credited him with the proceeds of the property sold by her.

In October, 1934, Dockterman attempted to negotiate a sale of said Lot 28 through John J. Gruske, a real estate agent at a price of \$1,600.00. A contract was drawn and signed by Dockterman. Gruske testified that Dockterman then said the property was in Milo's name and whatever he did would be all right with Milo; that at another conversation he (Gruske) suggested that Milo sign the contract, and Dockterman told him to go ahead and that when the witness was ready the property would be transferred; that he said the property was his, and that it was ^{for} a business reason that it was in Milo's name. Franklin F. Wingard, the attorney who represented the proposed purchaser, testified that in Milo's presence Dockterman said that while the property was in his son's name, it was really his property and that he was the one who handled real estate matters and he would determine whether the terms were satisfactory; that at another conversation Dockterman repeated his ownership and said Milo would do what he told him; that he had had a good many real estate dealings in his time and knew the law, and that the property was

eleven pieces were foreclosed, six pieces were sold on contract, three were deeded to a bank to prevent deficiency decrees, two were still held in Anna Taxman's name, and that he was collecting the rents for Gellman and paying the taxes on those still in Gellman's name; and that he had a book showing his collections and disbursements. He did not produce the book or say what he did with the proceeds of the property sold by him or with the rents collected. The testimony was closed more than five and one-half years after the deeds were made. It is not shown that any of the money received by Dockterman during that period was ever applied on the alleged debts to Gellman or Anna Taxman, or that he ever accounted to either of them in any way, or that Anna Taxman ever received or credited him with the proceeds of the property sold by her.

In October, 1934, Dockterman attempted to negotiate a sale of said lot 28 through John J. Gruske, a real estate agent at a price of \$1,800.00. A contract was drawn and signed by Dockterman. Gruske testified that Dockterman then said the property was in Milo's name and whatever he did would be all right with Milo; that at another conversation he (Gruske) suggested that Milo sign the contract, and Dockterman told him to go ahead and that when the witness was ready the property would be transferred; that he said the property was his, and that it was ^{for} a business reason that it was in Milo's name. Franklin T. Winstead, the attorney who represented the proposed purchaser, testified that in Milo's presence Dockterman said that while the property was in his son's name, it was really his property and that he was the one who handled real estate matters and he would determine whether the terms were satisfactory; that at another conversation Dockterman repeated his ownership and said Milo would do what he told him; that he had had a good many real estate dealings in his time and knew the law, and that the property was

being carried in Milo's name for certain reasons and purposes which he would not state, but smiled and passed it off with a laugh. Dockterman and his son equivocated about the above testimony but did not deny it in substance. The proposed sale was not consummated.

In our opinion the evidence shows the deeds were made for the purpose of avoiding payment of appellees' judgment. In addition to the actual fraud embraced in such transactions, the law is well settled, that even if there was a valuable consideration for the transfer, where the grantor reserves a secret interest, such as the right to sell the property and appropriate the proceeds to his own use, the transaction is deemed fraudulent per se. (Zwick v. Catavenis, 331 Ill.240; Beidler v. Crane, 135 id. 92; Greenebaum v. Wheeler, 90 id. 296.) The evidence tends to show a reservation of such a secret interest by Dockterman, so that, in any event, even if he did owe Gellman, the conveyance cannot stand as against his other creditors.

Gellman testified that after Lot 28 was deeded to him, he paid \$650.00 to cancel a first mortgage indebtedness thereon of about \$1,000.00 due, and about \$200.00 in taxes; that he sold the property to Milo Dockterman for \$1,500.00, upon which he had received "to date" \$100.00 principal and \$45.00 interest; and that Milo gave him an unsecured promissory note at the same time. He produced a note which he testified was "made out" and signed by Milo. He signified his willingness that the note remain with the Master until counsel for appellees said they would like to have an investigation made as to the age of the ink, whereupon appellants' counsel objected unless appellees' counsel introduced the note in evidence. The testimony as to the note and the consideration for it was then stricken as not the best evidence.

being carried in Milo's name for certain reasons and purposes which he would not state, but smiled and passed it off with a laugh. Lockerman and his son equivocated about the above testimony but did not deny it in substance. The proposed sale was not consummated.

In our opinion the evidence shows the deeds were made for

the purpose of avoiding payment of appellees' judgment. In addition to the actual fraud embraced in such transactions, the law is well settled, that even if there was a valuable consideration for the transfer, where the grantor reserves a secret interest, such as the right to sell the property and appropriate the proceeds to his own use, the transaction is deemed fraudulent per se. (Zwick v. Ostover, 281 Ill. 340; Baidler v. Crane, 135 Ill. 28; Greenbaum v. Wheeler, 80 Ill. 326.) The evidence tends to show a reservation of such a secret interest by Lockerman, so that, in any event, even if he did owe Gelman, the conveyance cannot stand as against his other creditors.

Gelman testified that after lot 28 was deeded to him, he paid \$250.00 to cancel a first mortgage indebtedness thereon of about \$1,000.00 due, and about \$200.00 in taxes; that he sold the property to Milo Lockerman for \$1,200.00, upon which he had received "to date" \$100.00 principal and \$45.00 interest; and that Milo gave him an unsecured promissory note at the same time. He produced a note which he testified was "made out" and signed by Milo. He testified his willingness that the note remain with the latter until counsel for appellees said they would like to have an investigation made as to the age of the ink, whereupon appellees' counsel objected unless appellees' counsel introduced the note in evidence. The testimony as to the note and the consideration for it was then stricken as not the best evidence.

Gellman claims that in any event he is entitled to subrogation in the amount he paid to discharge the mortgage and taxes on Lot 28. If the consideration for the deed to Milo was \$1,500.00, and if the \$850.00 paid out by Gellman was his money, it is not probable that he disregarded the latter amount in making the sale. This would mean that the property itself represented only \$650.00, to redeem which he invested \$850.00, which is illogical. The deed, like the other two, recites a consideration of \$1.00 and other good and valuable considerations. Gellman's answer to the complaint alleges that since the conveyance to him he had received \$850.00 from a sale of one of the properties, made with Dockterman's knowledge and consent, which was credited on the indebtedness. The allegation was not traversed, and he did not testify concerning it, or that he had received anything from the sale of the six or seven properties that Dockterman testified he had sold. While Gellman was not required to testify to facts alleged and not traversed, it is significant that the amount named in the allegation is the same amount he testified he paid to satisfy the mortgage and taxes. This is of importance when considered with the fact that Dockterman did not attempt to account for the proceeds of the properties sold by him, and Gellman did not allege in his answer that he received anything except the \$850.00, and did not testify that he received anything at all. The facts indicate that the \$850.00 paid to satisfy the mortgage and taxes, was the same \$850.00 received from the sale of one of the properties, and was in fact the money of Dockterman, and we so find. It is so obvious that the deed from Gellman to Milo was without consideration, but was a part of the whole fraudulent scheme, and that the reconveyance of the property to Gellman was for the sole purpose of enabling him to claim subrogation, as to need no further comment. Gellman is not entitled to subrogation.

Gelman claims that in any event he is entitled to subrogation in the amount he paid to discharge the mortgage and taxes on Lot 23. If the consideration for the deed to Milo was \$1,500.00 and if the \$850.00 paid out by Gelman was his money, it is not probable that he discharged the latter amount in making the sale. This would mean that the property itself represented only \$650.00, to reduce which he invested \$850.00, which is illogical. The deed, like the other two, recites a consideration of \$1.00 and other good and valuable considerations. Gelman's answer to the complaint alleges that since the conveyance to him he had received \$850.00 from a sale of one of the properties, made with Dockerman's knowledge and consent, which was credited on the indebtedness. The allegation was not traversed, and he did not testify concerning it, or that he had received anything from the sale of the six or seven properties that Dockerman testified he had sold. While Gelman was not required to testify to facts alleged and not traversed, it is significant that the amount named in the allegation is the same amount he testified he paid to satisfy the mortgage and taxes. This is of importance when considered with the fact that Dockerman did not attempt to account for the proceeds of the properties sold by him, and Gelman did not allege in his answer that he received anything except the \$850.00, and did not testify that he received anything at all. The facts indicate that the \$850.00 paid to satisfy the mortgage and taxes, was the same \$850.00 received from the sale of one of the properties, and was in fact the money of Dockerman, and we so find. It is so obvious that the deed from Gelman to Milo was without consideration, but was a part of the whole fraudulent scheme, and that the conveyance of the property to Gelman was for the sole purpose of enabling him to claim subrogation, to need no further comment. Gelman is not entitled to subrogation.

While, after Milo re-conveyed to Gellman, it was unnecessary to set aside the deed from Gellman to him, no harm resulted to anybody from that part of the decree and we are not disposed to reverse it on that account.

To mention and analyze the many cases cited by appellants applicable to situations not present here would only unduly extend the length of this opinion. While relationship of the parties is not of itself a controlling fact, it is one which may excite suspicion and is one to be taken into account in connection with all the other circumstances in the case bearing upon the question of fraud. (Johnston City State Bank v. Sowell, 277 Ill. App. 10.) Where the facts and circumstances show, as they do here, that a transaction is fraudulent as against creditors, statements under oath that it was in good faith and without a fraudulent intent are of little avail. (Bell v. Devore, 96 Ill. 217 (223); Olds v. Adams Clark Building Corp., 277 Ill. App. 157 (165). A deed fraudulent in fact is absolutely void as against creditors, and will not be permitted to stand for the purpose of reimbursement or indemnity.

Appellants suggest that appellees did not file a cross appeal from that portion of the decree dismissing the suit for want of equity as to all the property except Lot 28, and that it is inconceivable that the deeds, one of which included Lot 28, could be both valid and invalid at the same time. The evidence shows six of the tracts had been sold on contracts of record before the suit was started. Numerous others had been disposed of by foreclosure or deeds to prevent deficiency decrees. Other than Lot 28, the tracts deeded by Dockterman to and held by Gellman and Anna Taxman when the decree was entered had no substantial equity. Under the evidence

While, after this re-conveyance to Gellman, it was unnecessary to set aside the deed from Gellman to him, no harm resulted to anybody from that part of the decree and we are not disposed to reverse it on that account.

To mention and analyze the many cases cited by appellants applicable to situations not present here would only unduly extend the length of this opinion. While relationship of the parties is not of itself a controlling fact, it is one which may excite suspicion and is one to be taken into account in connection with all the other circumstances in the case bearing upon the question of fraud. (Donnan City State Bank v. Powell, 327 Ill. App. 10.) Where the facts and circumstances show, as they do here, that a transaction is fraudulent as against creditors, statements under oath that it was in good faith and without a fraudulent intent are of little avail. (Bell v. Leary, 98 Ill. 217 (1880); Ode v. Adams Clark Building Corp., 327 Ill. App. 187 (1928).) A good fraudulent in fact is absolutely void as against creditors, and will not be permitted to stand for the purpose of reimbursement or indemnity. Appellants suggest that appellees did not file a cross appeal from that portion of the decree dismissing the suit for want of equity as to all the property except lot 28, and that it is inconceivable that the decree, one of which included lot 28, could be both valid and invalid at the same time. The evidence shows six of the tracts had been sold on contracts of record before the suit was started. Numerous others had been disposed of by foreclosure or deeds to prevent deficiency judgments. Other than lot 28, the tracts owned by Dockerman to and held by Gellman and Anna Towner were never entered and no equitable equity. Under the evidence

the chancellor would have been justified in setting aside the deeds as to these tracts as well as to Lot 28, but to have done so would have been a fruitless gesture from which appellees would have obtained no benefit. The law does not require the doing of useless acts. The decree gave appellees all they could have obtained if it had included the setting aside of the tracts still in the name of Gellman and Anna Taxman. A cross appeal would have gained them nothing.

The decree of the circuit court is affirmed.

Decree affirmed.

the chancellor would have been justified in setting aside the deeds as to these tracts as well as to lot 28, but to have done so would have been a fruitless gesture from which appellees would have obtained no benefit. The law does not require the doing of useless acts. The decree gave appellees all they could have obtained if it had included the setting aside of the tracts still in the name of Gellman and Anna Taxman. A cross appeal would have gained them nothing.

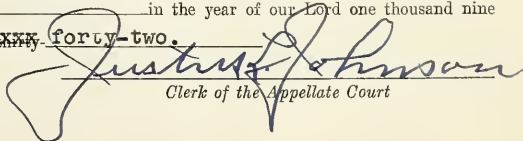
The decree of the circuit court is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of May in the year of our Lord one thousand nine hundred and ~~eighty~~ fourty-two.


Clerk of the Appellate Court



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

315 I.A. 127
OCTOBER TERM, A.D. 1941

CLARENCE E. BACHELLOR and
THOMAS E. ROBINSON,

Appellees,

-vs-

ALBERT DOCKTERMAN, MILO
DOCKTERMAN and I. C. GELLMAN,

Appellants.

APPEAL FROM THE
CIRCUIT COURT
OF ROCK ISLAND
COUNTY.

DOVE, J.

Appellants seek, by this appeal, a reversal of a decree of the Circuit Court of Rock Island County, in favor of appellees, setting aside as fraudulent, two deeds, one from Albert Dockterman and his wife to I. C. Gellman, and another from Gellman and his wife to Milo Dockterman, each conveying Lot 28 in Exposition Park Addition to the City of Rock Island.

Appellees, as owners of a farm mortgage, which had been assumed by Albert Dockterman, foreclosed the mortgage in the Circuit Court

IN THE
CIRCUIT COURT OF ILLINOIS
SECOND DISTRICT

APPELLATE TERM, 1901

APPEAL FROM THE
CIRCUIT COURT
OF ROCK ISLAND
COUNTY.

CHARLES E. BUCKLEMAN and
THOMAS E. BUCKLEMAN,

Appellants,

-vs-

ALBERT DOCKERTMAN, also
DOCKERTMAN and I. O. GELMAN,

Appellees.

NOV. 11

Appellants seek, by this appeal, a reversal of a decree of the Circuit Court of Rock Island County, in favor of appellees, setting aside as fraudulent, two deeds, one from Albert Dockertman and his wife to I. O. Gelman, and another from Gelman and his wife to Albert Dockertman, each conveying lot 22 in Exposition Park addition to the city of Rock Island.

Appellees, as owners of a farm mortgage, which had been assumed by Albert Dockertman, foreclosed the mortgage in the Circuit Court

of Whiteside County, and purchased the property at Master's sale on June 1, 1933, for \$6,000.00 leaving unpaid \$2,173.83 of the amount due. A deficiency judgment against Albert Dockterman for that amount was entered on June 12, 1933. A transcript of the judgment was filed in Rock Island County on June 19, 1933. An execution thereon was issued on September 18, 1933, and returned unsatisfied.

On the day of the foreclosure sale, June 1, 1933, Albert Dockterman and his wife executed a deed to Gellman, conveying sixteen parcels of real estate, including said Lot 28, and another deed to Anna Taxman, conveying eight other parcels of real estate. These deeds were recorded the next day. Gellman and his wife conveyed said Lot 28 to Milo Dockterman by deed dated October 4, 1934, recorded the next day, October 5th. Each of the deeds is a quit claim deed, reciting a consideration of \$1.00 and other good and valuable considerations. Gellman is a brother-in-law, and Milo Dockterman is a son, of Albert Dockterman, who was in the real estate business. Anna Taxman is his niece. Albert Dockterman testified that Anna Taxman's St. Louis address is "General Delivery"; that sometimes she visits him, sometimes she goes to Florida, and that she has a lot of money. Gellman is a manufacturer, living in Rock Island.

Appellees filed a complaint on October 30, 1934, against Albert Dockterman, Anna Taxman, I. C. Gellman and his wife to set aside the two deeds of June 1, 1933. While that suit was pending, they filed another complaint against Albert and Milo Dockterman, and Frank Zarub, an allegedly fraudulent contract purchaser from Milo, to set aside the deeds and contract as to said Lot 28 only. Gellman was not made a party defendant to the latter suit, and was denied leave to intervene. A decree setting aside the deeds and contract as to said Lot 28 was

of Whitehorse County, and purchased the property at a later sale on June 1, 1903, for \$8,000.00 leaving a balance of \$3,173.28 of the amount due. A deficiency judgment against Albert Lookerman for that amount was entered on June 12, 1903. A transcript of the judgment was filed in Cook Island County on June 12, 1903. An execution thereon was issued on October 18, 1903, and returned unsatisfied.

On the day of the foreclosing sale, June 1, 1903, Albert Lookerman and his wife executed a deed to Gelman, conveying sixteen parcels of real estate, including said lot 28, and another deed to Anna Taxman, conveying eight other parcels of real estate.

These deeds were recorded the next day. Gelman and his wife conveyed said lot 28 to Mild Lookerman by deed of record October 4, 1904, recorded the next day, October 5th. Each of the deeds is a quit claim deed, reciting a consideration of \$1.00 and other good and valuable consideration. Gelman is a brother-in-law, and Mild

Lookerman is a son, of Albert Lookerman, who was in the real estate business. Anna Taxman is his niece. Albert Lookerman testified that Anna Taxman's St. Louis address is "General Delivery"; that sometimes she visits him, sometimes she goes to Florida, and that she has a lot of money. Gelman is a manufacturer, living in Cook Island.

Appellees filed a complaint on October 30, 1904, against Albert Lookerman, Anna Taxman, I. C. Gelman and his wife to set aside the two deeds of June 1, 1903. While that suit was pending, they filed another complaint against Albert and Mild Lookerman, and Frank Tarp, an allegedly fraudulent contract purchaser from Mild, to set aside the deed and contract as to said lot 28 only. Gelman was not made a party defendant to the latter suit, and was called leave to intervene. A decree setting aside the deed and contract as to said lot 28 was

reversed by this court on account of the denial of leave to intervene and the cause was remanded. (Bachellor v. Dockterman, 291 Ill. App. 418.) On the same day the motion of appellees to redocket that cause was filed (November 17, 1937) Milo Dockterman reconveyed the premises to Gellman, and on January 28, 1938, Dockterman filed a motion for leave to file a supplemental answer in the nature of a disclaimer. Upon the redocketing of the cause, Gellman answered and the two causes were consolidated and re-referred to a Special Master to take the testimony. The decree appealed from dismisses the complaint as to all the property except said Lot 28, and in addition to setting aside the two deeds mentioned, cancels, as fraudulent, the Zarub contract. Zarub did not appeal.

The record discloses that Albert Dockterman was dealing in equities. He lost a farm in Iowa and the one in Whiteside County through foreclosures. The deeds of June 1, 1933, divested him of title to all his property, except an incumbered farm in Minnesota. It is not shown that it is of any value above the mortgage. He estimated the value of the property conveyed to Gellman at \$32,945.00, subject to taxes due and incumbrances of \$30,832.00, leaving a net value of \$2,112.00; that the value of the property conveyed to Anna Taxman was \$20,950.00, less incumbrances and taxes due amounting to \$20,322.00, leaving its net value \$628.00. He testified and claims the deeds were not made as absolute transfers, but were in the nature of second mortgages to secure indebtedness due the grantees.

Elmore A. Gripp, an attorney and the secretary of Gellman's manufacturing company, testified he acted as agent and attorney for Gellman in loaning various sums of money to Dockterman. Gripp and Dockterman testified that Gripp, as attorney for Gellman, had asked for payment or security about six months before the deeds were made;

reversed by this court on account of the denial of leave to introduce evidence and the cause was remanded. (Bachellor v. Tuckerman, 231 Ill. App. 418.) On the same day the motion of appellee to rescind that cause was filed (November 14, 1937) and Tuckerman recovered the premises to Gellman, and on January 28, 1938, Tuckerman filed a motion for leave to file a supplemental answer in the nature of a disclaimer. Upon the rescinding of the cause, Gellman answered and the two causes were consolidated and re-referred to a Special Master to take the testimony. The decree quelled from the issues the complaint as to all the property except said lot 28, and in addition to setting aside the two heads mentioned, canceled, as fraudulent, the Karpis contract. Same did not appeal.

The record discloses that Albert Tuckerman was residing in Edinburg. He lost a farm in Iowa and the one in Wisconsin County through foreclosure. The deeds of June 1, 1923, divested him of title to all his property, except an incumbered farm in Minnesota. It is not shown that it is of any value above the mortgage. He estimated the value of the property conveyed to Gellman at \$22,945.00, subject to taxes due and insurance of \$30,822.00, leaving a net value of \$2,123.00; that the value of the property conveyed to Anna Tuckman was \$20,000.00, less mortgages and taxes due amounting to \$20,322.00, leaving the net value \$228.00. He testified and claims the deeds were not made as absolute transfers, but were in the nature of second mortgages to secure indebtedness the two parties.

Elmore A. Oriskany, attorney and the secretary of Gellman's manufacturing company, testified he acted as agent and attorney for Gellman in loaning various sums of money to Tuckerman. Tuckerman testified that Oriskany, as attorney for Gellman, had asked for payment of security about six months before the debts were made;

that Dockterman brought in a list of his property, except the Whiteside County farm; and that they had several conversations about the matter. Gellman testified he did not know Dockterman had assumed liability on the Whiteside County farm mortgage. Dockterman testified he did not talk to Gellman or Gripp about transferring his property to Gellman between March and June 1, 1933, and that he transferred the property on the latter date because Gripp called him to his office. He also testified he did not know when the farm was sold, but was notified it had been sold on June 1, 1933 to appellees for \$8,000.00; and that he thought he was up there and talked with the Master after it was sold, but did not remember whether he was there before the sale. Gripp was not representing Anna Taxman, and the record does not show she was asking for payment or security, or knew anything about the deed to her before or when it was made. Nevertheless, Dockterman conveyed all his property to her that he did not convey to Gellman, except the Minnesota farm.

On the first hearing Gripp testified he could not recall whether he knew the Whiteside County farm was being sold on the day the Gellman deed was executed. Although the testimony shows he had the list of Dockterman's property for some months prior to June 1, 1933, he testified on the second hearing:

"In a general sort of way I had talked with Mr. Dockterman as to the extent of his holdings at the time this deed to I. C. Gellman was made. I did not know all the property which he had on that day but I knew he had sixteen pieces he transferred to Mr. Gellman on June 1, 1933. In a general way, I knew he had other property which he conveyed to Miss Taxman, and I knew about this farm in Whiteside County. *** I knew it was in foreclosure. I knew it was going to be sold but I did not know it was going to be sold on June 1, 1933."

His testimony does not accord with his testimony on the first hearing. He also testified that Dockterman told him the properties listed were incumbered by delinquent taxes and mortgages; that his

that I certainly brought in a list of the names, among the
Whiteside County names, and that they had several conversations
about the matter. I certainly did not know anything
had been said about the property on the Whiteside County farm.
Docketman testified he did not talk to Gellman or Gellman about
transferring his property to Gellman between June 1, 1933,
and that he transferred the property on the latter date because
Gellman called him to his office. He also testified he did not know
when the farm was sold, but was notified it had been sold on June
1, 1933 to Gellman for \$5,000.00; and that he thought he was up
there and talked with the master after it was sold, but did not
remember whether he was there before the sale. Gellman was not represented

in any way, and the record does not show she was waiting for pay-
ment or security, or knew anything about the need to her help or
when it was made. Docketman testified, Docketman conveyed all his property
to her that he did not convey to Gellman, except the Whiteside farm.
On the first hearing Gellman testified he could not recall whether

he knew the Whiteside County farm was being sold on the day the
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list of Docketman's property for some months prior to June 1, 1933,
he testified on the second hearing:

"In a conversation of my I had talked with Mr. Docketman
as to the extent of his holdings at the time this deed to
I. J. Gellman was made. I did not know all the property
which he had on that day but I knew he had sixteen places, he
transferred to Mr. Gellman on June 1, 1933. In a general way,
I knew he had other property which he conveyed to Miss Taylor,
and I know about this farm in Whiteside County. I know it
was in Whiteside County. I knew it was going to be sold but I did
not know it was going to be sold on June 1, 1933."

His testimony does not accord with his testimony on the first
hearing. He also testified that Docketman told him the property
list was furnished by Docketman and was correct; that his

(Gripp's) experience gave him a knowledge of real estate values, particularly of the type conveyed by the deeds, and that he had investigated the properties, many of them by personal inspection, and his opinion was that there was very little equity in any of them. Yet, as Gellman's attorney, purportedly seeking security for a debt, he prepared the deeds conveying a part of the property to Anna Taxman, whom he did not represent, and who is not shown to have known anything about the transaction, when there was very little equity in all the property, and it is claimed that Gellman's debt was \$7,350.00.

Dockterman testified he owed Anna Taxman \$1,400.00. He did not state how or when the indebtedness was incurred, and his testimony is uncorroborated. He did not testify how much he owed Gellman. Gellman testified the amount was \$7,350.00, without interest. His testimony indicates it was for loans, but neither of them testified to the date or amount of any such loan. The only effort of appellants to show any such loan was the following: Gripp testified that for Gellman he loaned Dockterman \$700.00 on February 11, 1932; and that on April 24, 1933, he deposited in Dockterman's account in a Rock Island bank the sum of \$1,150.00, which was furnished by Gellman for that purpose. Gripp's check for \$700.00 to Dockterman of the date mentioned, with the latter's endorsement and a judgment note of the same date and amount, due in twenty days, payable to Gripp, with an undated endorsement to Gellman, were introduced in evidence, together with a deposit slip reading:

"Deposited by E. A. Gripp for I. C. Gellman to pay
cks. No. 7088 and No. 7089, for Clerk of Dist. Court
of Wapello County, \$500. and \$350.; paid April 24,
1933, State Bank of Rock Island, Illinois."

If Gellman furnished the \$700.00, there is no documentary evidence to show it, and there is no explanation of why the judgment note was

made payable to Gripp; nor is it shown when the note was endorsed to Gellman. The \$1,150.00 deposit slip shows the money was not deposited in Dockterman's account, as testified by Gripp, but for Gellman, and there is no showing that the checks it paid were checks of Dockterman. According to the testimony of both Gellman and Gripp the latter was acting as Gellman's attorney in making loans to Dockterman and in obtaining security therefor, but Gripp testified he did not know how much money Dockterman owed Gellman on June 1, 1933, yet Dockterman testified he had turned the whole matter over to Gripp, "including the documents to show what money was loaned." None of the alleged documents were produced.

Dockterman testified he sold six or seven of the properties deeded, and told Gellman and Anna Taxman to "sell maybe, seven pieces"; that mortgages on eight of the properties were foreclosed, four were sold on contract, two deeded to prevent deficiency decrees, one taken over by a bank, two were still held in Anna Taxman's name, and that he was collecting the rents for Gellman and paying the taxes on those still in Gellman's name; and that he had a book showing his collections and disbursements. He did not produce the book or say what he did with the proceeds of the property sold by him or with the net rents collected.

In October, 1934, Dockterman attempted to negotiate a sale of said Lot 28 through John J. Gruske, a real estate agent, at a price of \$1,600.00. A contract was drawn and signed by Dockterman and his wife. Gruske testified that Dockterman then said the property was in Milo's name and whatever he did would be all right with Milo; that at another conversation he (Gruske) suggested that Milo sign the contract, and Dockterman told him to go ahead and that when the witness was ready the property would be transferred; that he said the

property was his, and that it was a business reason that it was in Milo's name. Franklin F. Wingard, the attorney who represented the proposed purchaser, testified that in Milo's presence Dockterman said that while the property was in his son's name, it was really his property and he was the one who handled real estate matters and he would determine whether the terms were satisfactory; that at another conversation Dockterman repeated his ownership and said Milo would do what he told him; that he had had a good many real estate dealings in his time and knew the law, and that the property was being carried in Milo's name for certain purposes and purposes which he would not state, but smiled and passed it off with a laugh. Dockterman and his son equivocated about the above testimony but did not deny it in substance. The proposed sale was not consummated.

In our opinion the evidence does not show that Albert Dockterman owed Gellman or Anna Taxman any money when the deeds to them were executed, but that on the contrary it shows the deeds were made for the purpose of avoiding payment of appellee's judgment. In addition to the actual fraud embraced in such a transaction, the law is well settled, that even if there was a valuable consideration for the transfer, where the grantor reserves a secret interest, such as the right to sell the property and appropriate the proceeds to his own use, the transaction is deemed fraudulent per se. (Zwick v. Catavenis, 331 Ill. 240; Reidler v. Crane, 135 id. 93; Greenebaum v. Wheeler, 90 id. 296.) The evidence tends to show a reservation of such a secret interest by Dockterman, so that in any event, even if he did owe Gellman, the conveyance cannot stand as against his other creditors.

Gellman testified that after Lot 28 was deeded to him, he paid \$650.00 to cancel a first mortgage indebtedness thereon of about \$1,000.00 due, and about \$200.00 in taxes; that he sold the property

...and that it was not necessary to prove that it was
in the nature of a gift. The trial judge, the learned judge
the learned judge, testified that in his opinion the property
and that while the property was in the hands of the donor
his property and he was the owner of the property and that it
he could not have disposed of the property without the consent
other consideration. The learned judge, however, did not find
would be that he was not a donor of the property and that
dwelling for the time being for the law, and that the property was
being, and that in this case the court in disposing of the property which
would not state, but which was stated in the trial judge's
Docketman and in the evidence about the property, but did
not rely on it in his opinion. The learned judge was not
In my opinion the evidence does not show that the property
was sold or that it was given away and that the property
executed, but that on the contrary it was the donor's duty to
the purpose of avoiding payment of the donor's duty. In addition
to the actual finding and the fact that the donor was well
satisfied that even if there was a finding of the donor's duty
the donor's duty was not a donor's duty, such as the
right to sell the property and to dispose of the property to his own
use, the donor's duty is not a donor's duty. See, for example, *Wicks v. O'Connell*, 90
Cal. 111, 24 Cal. 2d 111, 151 P. 2d 111; *Wicks v. O'Connell*, 90
Cal. 111, 24 Cal. 2d 111, 151 P. 2d 111. The learned judge was not a donor of the property
in the nature of a gift, but that in his opinion, and in his
opinion, the court should not be bound by his opinion.
The learned judge's opinion that after the donor's duty, he was
not a donor of the property, but that the donor's duty was not a donor's duty.

to Milo Dockterman for \$1,500.00, upon which he had received "to date" \$100.00 principal and \$45.00 interest; and that Milo gave him an unsecured promissory note at the same time. He produced a note which he testified was "made out" and signed by Milo. He signified his willingness that the note remain with the Master until counsel for appellee said they would like to have an investigation made as to the age of the ink, whereupon appellant's counsel objected unless appellee's counsel introduced the note in evidence. The testimony as to the note and the consideration for it was then stricken as not the best evidence.

Gellman claims that in any event he is entitled to subrogation in the amount he paid to discharge the mortgage and taxes on Lot 28. If the consideration for the deed to Milo was \$1,500.00, and if the \$850.00 was Gellman's money, it is not probable that he disregarded the latter amount in making the sale. This would mean that the property itself represented only \$850.00, to redeem which he invested \$850.00, which is illogical. The deed, like the other two, recites a consideration of \$1.00 and other good and valuable considerations. Gellman's answer to the complaint alleges that since the conveyance to him he had received \$850.00 from a sale of one of the properties, made with Dockterman's knowledge and consent, which was credited on the indebtedness. The allegation was not traversed, and he did not testify concerning it, or that he had received anything from the sale of the six or seven properties that Dockterman testified he had sold. While Gellman was not required to testify to facts alleged and not traversed, it is significant that the amount named in the allegation is the same amount he testified he paid to satisfy the mortgage and taxes. This is of importance when considered with the fact that

to this mortgage for \$1,500.00, when which he had received the date: 1901.00. or 1902.00 interest; and that this gave him an unsecured promissory note at the same time. He produced a note which he testified was "made out" and signed by him. He admitted his signature to the note, saying with the latter until counsel for appellee said they would like to have an inspection made as to the age of the note, whereon an affidavit counsel deposed that appellee's counsel introduced the note in evidence. The testimony as to the note and the consideration for it was then stricken as not the best evidence.

Gelman claims that in any event he is entitled to subordination in the amount he said to discharge the mortgage and claims on foot as if the consideration for the deed to him was \$1,500.00, and if the \$850.00 was Gelman's money, it is not probable that he discharged the latter amount in making the sale. It would seem that the property itself represented only \$150.00, or rather when he received \$850.00, which is illogical. The deed, like the other two, recited a consideration of \$1.00 and other good and valuable considerations. Gelman's answer to the complaint alleges that since the conveyance to him he had received \$850.00 from a sale of one of the properties, and with respondent's approval and consent, which was directed by the indebtedness. The allegation was not traversed, and he did not testify concerning it, or that he had received anything from the sale of the six or seven properties that respondent testified he had sold. While Gelman was not required to testify to having received and not traversed, it is significant that the answer made in the objection to the same amount he testified he said to satisfy the mortgage and taxes. This is of importance when considered with the fact that

Dockterman did not attempt to account for the proceeds of the properties sold by him, and Gellman did not allege in his answer that he received anything except the \$850.00, and did not testify that he received anything at all. These facts indicate that the \$850.00 paid to satisfy the mortgage and taxes, was the same \$850.00 received from the sale of one of the properties, and was in fact the money of Dockterman, and we so find. It is so obvious that the deed from Gellman to Milo was without consideration, but was a part of the whole fraudulent scheme, and that the reconveyance of the property to Gellman was for the sole purpose of enabling him to claim subrogation, as to need no further comment. Gellman is not entitled to subrogation.

While, after Milo re-conveyed to Gellman, it was unnecessary to set aside the deed from Gellman to him, no harm resulted to anybody from that part of the decree and we are not disposed to reverse it on that account.

To mention and analyze the many cases cited by appellants applicable to situations not present here would only unduly extend the length of this opinion. While relationship of the parties is not of itself a controlling fact, it is one which may excite suspicion and is one to be taken into account in connection with all the other circumstances in the case bearing upon the question of fraud. (Johnston City State Bank v. Sowell, 377 Ill. App. 10.) Where the facts and circumstances show, as they do here, that a transaction is fraudulent as against creditors, statements under oath that it was in good faith and without a fraudulent intent are of little avail. (Bell v. Devore, 96 Ill. 217 (223); Olds v. Adams, ^{Clark Bldg. Corp.,} 377 Ill. App. 157 (165). A deed fraudulent

in fact is absolutely void as against creditors, and will not be permitted to stand for the purpose of reimbursement or indemnity.

The decree of the circuit court is affirmed.

Decree affirmed.

to fact is impossible with the present condition, and will not
be possible in the future for the purpose of securing an
industry.
The reason is the result of it is 10/100.

James Watson.

41932

NATIONAL BUILDERS BANK OF CHICAGO,
a Corporation, Administrator of the
Estate of Julia Goldberg, Deceased,
and VALERIE WINNICK, in her
individual rights,

Appellants,

v.

KASPAR AMERICAN STATE BANK, a
Corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

315 I.A. 127³

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In a fire which occurred in the early morning of April 23, 1935, in an apartment building, owned and operated by defendant, located on Sheridan road in Chicago, Julia Goldberg, occupying one of the apartments, lost her life, and Valerie Winnick, her granddaughter living with her, suffered injuries; the administrator and Valerie Winnick brought suit for damages sustained, and upon trial the verdict was not guilty, and they appeal from the judgment for the defendant. The two women are hereafter called plaintiffs.

It was stipulated that the fire was started by a man who had no connection with either the plaintiffs or the defendant.

The building is located at the southeast corner of the intersection of Sheridan road and Greenleaf avenue, and fronts easterly on Sheridan road. Plaintiffs occupied an apartment on the second floor. There is a door on the Greenleaf avenue side which leads into an areaway, and steps from this lead to the rear of the apartment. There is also a front door to the apartment.

The complaint set forth the names of the heirs and next of kin of the deceased, Julia Goldberg, and the letters of administration of her estate issued to the National Builders Bank of Chicago; damages of \$10,000 was asked by the administrator, and \$75,000 for Valerie Winnick.

• ∇

Appellee,
KAPPA ALPHA KAPPA NATIONAL STATE BANK, &
Corporation,

1874

.T. 60 TIDF 10

AT 100 500

MR. PRESIDING JUSTICE: RECALL BY DIVISION OF THE COURT.

In a fire which occurred in the early morning of April 23, 1935, in an apartment building, owned and operated by defendant, located on Sheridan road in Chicago, Julie Goldberg, occupying one of the apartments, lost her life, and Valerie, her granddaughter living with her, suffered injuries; the administrator and Valerie innick brought suit for damages sustained, and upon trial the verdict was not guilty, and they a call from the judgment for the defendant. The two women are hereafter called plaintiffs.

It was stipulated that the fire was started by a man who had no connection with either the plaintiffs or the defendant. The building is located at the southeast corner of the intersection of Sheridan road and Greenleaf avenue, and fronts easterly on Sheridan road. Plaintiffs occupied an apartment on the second floor. There is a door on the Greenleaf avenue side which leads into an alleyway, and steps from this lead to the rear of the apartment. There is also a front door to the apartment.

45,000 for Valerie Windsor.
 1945; a sum of 10,000 was asked by the Administrator, and
 a list of her estate issued to the National Endowment Fund of
 of kin of the deceased, Julia Golobay, and the letters of admin-
 The complaint set forth the names of the heirs and next

The case went to trial on plaintiffs' amended complaint of four counts. The first count charged that defendant was negligent in violating certain ordinances with respect to fire escapes. Count two alleged that defendant failed to equip the building with portable fire apparatus as required by a city ordinance. Count three charged negligence in the failure to install a sprinkler system in the basement, but this third count, on motion of plaintiffs, was dismissed. Count four charged defendant with negligence in that it permitted large amounts of combustible material to be and remain in the entrance way leading to the rear of the apartment occupied by plaintiffs, and also that defendant had agreed to repair a lock on the front door of the apartment, but failed to do so.

During the trial additional counts were filed by plaintiffs touching the alleged failure of the defendant to repair the lock. Other additional counts were filed but stricken by the court.

Plaintiffs assert that the building was constructed without fire escapes, required by city ordinances, but failed to present any evidence which brings the building within the provisions of these ordinances. The proof shows that the building was a three story apartment building with an English basement. Sub-par. (b) of §1642 (Art. 2, ch. 27 of the Chicago Code, 1931) provides, with reference to fire escape requirements, that fire escapes shall, with certain exceptions, be constructed on "Every building four or more stories in height..."

Defendant introduced a number of witnesses connected with the building department of the City of Chicago, who testified that under the practice of the department the building in question did not come within the description of a building requiring fire escapes. Witness Reddersen testified that he was a structural

The case went to trial on plaintiffs' amended complaint of four counts. The first count alleged that defendant was negligent in violating certain ordinances with respect to fire escapes. Count two alleged that defendant failed to equip the building with portable fire apparatus as required by a city ordinance. Count three charged negligence in the failure to install a sprinkler system in the basement, but this third count, on motion of plaintiffs, was dismissed. Count four charged defendant with negligence in that it permitted large amounts of combustible material to be and remain in the entrance way leading to the rear of the apartment occupied by plaintiffs, and also that defendant had agreed to repair a lock on the front door of the apartment, but failed to do so.

During the trial additional counts were filed by plaintiffs touching the alleged failure of the defendant to repair the lock. Other additional counts were filed but stricken by the court.

Plaintiffs assert that the building was constructed without fire escapes, required by city ordinances, but failed to present any evidence which brings the building within the provisions of these ordinances. The proof shows that the building was a three story apartment building with an English basement. Sub-par. (b) of §1412 (Art. 1, ch. 27 of the Illinois Code, 1921) provides, with reference to fire escape requirements, that fire escapes shall, with certain exceptions, be constructed on "very building four or more stories in height..."

Defendant introduced a number of witnesses connected with the building department of the city of Chicago, who testified that under the direction of the department the building in question did not come within the description of a building requiring fire escapes. Witness Suburban testified that he was a structural

engineer, employed as a plan examiner of the building department since 1914, and that the department had never required a fire escape on a building of this kind. The fire prevention engineer of the city also testified that this was the construction placed upon this ordinance by the city departments. Such testimony was proper, as has been decided in People v. Rosehill Cemetery Co., 371 Ill. 510, 513-514; Nye v. Foreman, 215 Ill. 285; Village of Broadview v. Toman, 309 Ill. App. 485, 500. No evidence was adduced by plaintiffs that there was any building in Chicago of the type of the building in question equipped with fire escapes. The court properly instructed the jury to find defendant not guilty as to the charges that defendant was negligent with respect to fire escape requirements.

Plaintiffs do not argue in this court that it was error to instruct the jury to find the defendant not guilty with reference to count two, which charged defendant with negligence in failing to equip the building with portable fire apparatus. Moreover, there was no evidence as to whether the building was or was not so equipped.

The fourth count charged defendant with negligence in permitting large amounts of combustible matter to be and remain in the entrance way leading to the rear of the apartment occupied by plaintiffs. There was a barrel in the corner of the rear areaway which was used by the tenants in which to put rubbish; the tenants were not altogether careful in throwing paper and other rubbish into the barrel, and on the night before the fire some of this rubbish fell on the floor. There was testimony that the janitor cleaned this areaway every day and that whatever rubbish was there was there only temporarily. No permanent accumulation of rubbish was permitted. There was also evidence that some window screens, not used, were stacked beneath the wooden stairs - one behind the other, and that there was a

engineer, employed as a plan examiner of the building department since 1915, and that the department has never required a fire escape on a building of this kind. The fire prevention engineer of the city also testified that this was the construction placed upon this ordinance by the city department. Such testimony was proper, as has been decided in People v. Joseph G. Gentry, 371 Ill. 510, 513-514; People v. Foreman, 315 Ill. 505; People v. Foreman, 303 Ill. 485, 500. No evidence was adduced by plaintiffs that there was any building in Chicago of the type of the building in question equipped with fire escapes. The court properly instructed the jury to find defendant not guilty as to the charges that defendant was negligent with respect to fire escape requirements.

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The fourth count charged defendant with negligence in permitting large amounts of combustible matter to be and remain in the entrance way leading to the rear of the apartment occupied by plaintiffs. There was a barrel in the corner of the rear alleyway which was used by the tenants in which to put rubbish; the tenants were not altogether careful in throwing paper and other rubbish into the barrel, and on the night before the fire some of this rubbish fell on the floor. There was testimony that the janitor cleaned this alleyway every day and that what ever rubbish was there was there only temporarily. No permanent accumulation of rubbish was permitted. There was also evidence that some window screens, not glass, were stacked beneath the wooden stairs - one behind the stairs, and that there was a

mattress or carpet placed over them.

Plaintiffs' argument seems to be that the presence of these screens made it easier for the person starting the fire to set the wooden stairway on fire, and that this rubbish caused the flames to spread to the wooden stairs and porches. There is no evidence to show where the starting point of the fire was. As counsel for the defendant say: As far as the evidence is concerned the fire might have started on the first or even the second landing; that there is no evidence as to what portion, if any, of the screens or the barrel was burned, and no evidence that any of these articles had anything to do with the starting of the fire. Nor is there any evidence that defendant should have anticipated that a third person might enter the areaway and make use of these articles to set the stairway on fire.

In Sycamore Preserve Works v. C. & N. W. Ry. Co., 366 Ill. 11, 17, a fire originating on the defendant's right of way destroyed the plaintiff's warehouse and other property; a statute was pleaded which required that the right of way of the railroad should be kept clear of dead grass and other combustible material; it was not alleged that the fire was started by the defendant railroad. It was held that to hold defendant liable for the resulting damages it must be shown that the starting of the fire was a result of the railroad's violation of the statute, which result was probable or foreseeable. This was followed in Eilts v. Illinois Cent. R. Co., 303 Ill. App. 25, where it was held that if the fire was started by the act of another and not in connection with the operation of the railroad, it was not liable. See also Seith v. Commonwealth Elec. Co., 241 Ill. 252, where it was held that the injury to plaintiff was caused by the independent act of an agency other than the defendant. Numerous other cases support the conclusion that in this case the act of a third party in starting the fire was an independent act, which,

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it was held that the injury to plaintiff was caused by the in-

dependent act of an agency other than the defendant. Various

other cases support the conclusion that in this case the act of

a third party in starting the fire was an independent act, which

if it had not occurred, the storing of the articles in the areaway would have caused no injury to anyone.

Even if the presence of these screens and articles aided the progress of the fire, their presence merely furnished a condition by which the fire was made possible through the independent act of a third person. Under such circumstances the existence of the condition is not the proximate cause of the injury. Illinois Cent. R. Co. v. Oswald, 338 Ill. 270, and other cases. The court applied well established rules of law in directing a verdict for the defendant as to the charge of permitting large amounts of combustible material to remain in the areaway.

Much of the evidence relates to the charge that the defendant undertook and agreed to repair a lock to the front door of the apartment but failed to do so. There were two locks - one beneath the other - on the front door. It is argued that the upper lock would not unlock so the door could be opened.

Valerie Winnick testified that she was awakened by the smoke; that she saw flames in the other room where her grandmother, Mrs. Goldberg, was sleeping on a day bed near the windows; that she got her grandmother out of bed and made a rush for the front door and tried to open it; she turned the knob of the lower lock and also the knob of the upper lock but the door would not open; she looked out of the window but was afraid to jump, and ran back again at the front door and tried to open it; she knocked on the door and cried for help. A fireman entered the apartment through the window; he found both the women lying on the floor; he went to the front room door, attempted to open it but failed, and called to the firemen in the hall to kick the door open, which was done; this fireman carried both the women down the front way; they were unconscious; the elderly lady did not revive, and died, while Valerie Winnick was taken to a hospital.

if it had not occurred, the setting of the articles in the room - way would have caused no injury to anyone.

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injury. Illinois Cent. R. Co. v. Gawald, 338 Ill. 270, and other cases. The court applied well established rules of law in directing a verdict for the defendant as to the charge of permitting large amounts of combustible material to remain in the premises. Much of the evidence relates to the charge that the defendant unlocked and agreed to repair a lock to the front door of the apartment but failed to do so. There were two locks - one beneath the other - on the front door. It is argued that the upper lock would not unlock as the door could be opened.

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There is a direct conflict in the testimony of the witnesses as to the condition of this upper lock. The fireman testified that he could not open the front door. Harry Winnick, father of Valerie Winnick, testified that in October 1934 he made the arrangement for renting the apartment; that he got the keys from the janitor and the janitor put the key in the front door upper lock but it would not unlock, and that the janitor planned to fix it that afternoon or put on another lock. Winnick testified in great detail as to the condition of the lock, which was to the effect that it would not unlock. Valerie Winnick also testified that, on the Sunday before the fire when they went to enter the apartment after a walk, the upper lock would not open the door and they got the janitor to turn the lock, and he then promised that he would fix it the following morning. Two sons of Mrs. Goldberg gave testimony tending to support plaintiffs' theory that the lock would not respond.

As opposed to this was the testimony of Jules DeReuse, the janitor, (called Julius by the witnesses.) He testified he knew about the two locks on the front door, that he never at any time attempted to repair the upper lock, never promised anybody that he would repair it, that he never knew Harry Winnick before the fire and never discussed with him anything about the lock. John Gessner, manager of the building, testified that he arrived at the apartment about 6 o'clock on the morning of the fire; that the upper lock was in perfect condition. Defendant at the trial introduced as an exhibit a lock which Gessner testified was the same upper lock that was on the door the day of the fire and that nothing had been done to it except having some keys made, and that it was in good condition. Witness Grusdat, a carpenter, testified that he was at the apartment about 8 o'clock on the morning of the fire; that he took the upper lock

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over to the hardware store and had keys made for it; that the lock exhibited to the jury was the upper lock; that he mounted it on the door and tried it with the key and there was nothing wrong with it; that it was in the same condition as when he first took it off the door and he had made no repairs on it whatever. Other witnesses gave testimony tending to show that the lock was in working condition at the time of the fire.

Whether the lock in question was defective and out of repair at the time of the fire so the door could not be opened was a question of fact for the jury. They saw the witnesses and heard them testify and knew of their respective interests in the case. They resolved the question as to the condition of the lock in favor of the defendant, and we cannot say that this conclusion is against the manifest weight of the evidence.

Among the interrogatories submitted to the jury was the following: "Q. Do you find that the janitor, mentioned in the evidence, before the apartment, mentioned in the evidence, was rented for occupancy by Valerie Winnick and Julia Goldberg, promised to repair the upper lock described in the evidence?" To this the jury answered in the negative. Counsel for plaintiffs criticizes this and other interrogatories, but presents nothing substantial in this respect.

Counsel for plaintiffs complains almost bitterly of the many times the trial of the case was interrupted by arguments to the court on the propriety of questions, and admissibility of evidence, had in chambers or when the jury was excused. He asserts that this action of the court made it impossible for the jury to consider the evidence in any connected manner. While we are not in sympathy with the practice of frequent consultations or arguments out of the hearing of the jury during the trial of a case, yet, in the present instance, while such interruptions

over to the hardware store and had keys made for it; that the lock exhibited to the jury was the proper lock; that he mounted it on the door and tried it with the key and there was nothing wrong with it; that it was in the same condition as when he first took it off the door and he had made no repairs on it whatever. Other witnesses gave testimony tending to show that the lock was in working condition at the time of the fire.

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Among the interrogatories submitted to the jury was the following: "Do you find that the janitor, mentioned in the evidence, before the apartment, mentioned in the evidence, was rented for occupancy by Valerie Innick and Julia Goldberg, promised to repair the upper lock described in the evidence?" To this the jury answered in the negative. Counsel for plaintiffs criticizes this and other interrogatories, but presents nothing substantial in this respect.

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were many, we cannot say that they worked to the prejudice or advantage of either of the parties. At least, there was no reversible error with respect to these.

Many objections are made to the rulings of the court on the admissibility of the evidence. We find nothing in this respect which requires comment. Many points are made, but considered as a whole, plaintiffs had a fair trial. Neither do we find any reversible error in the instructions given to the jury.

Plaintiffs' brief makes charges against both opposing counsel and the court, but the verdict is supported by the manifest weight of the evidence and, as we find no reversible error occurred upon the trial, the judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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Many objections are made to the rulings of the court on the admissibility of the evidence. We find nothing in this respect which requires comment. Many points are made, but considered as a whole, plaintiff had a fair trial. Neither do we find any reversible error in the instructions given to the jury.

Plaintiff's brief makes charges against both opposing counsel and the court, but the verdict is supported by the manifest weight of the evidence and, as we find no reversible error occurred upon the trial, the judgment is therefore affirmed.

AFFIRMED.

Mathelet and O'Connor, JJ., concur.

41943

CHICAGO TITLE & TRUST COMPANY,
a corporation, Trustee,
Appellee,

v.

1146 MILWAUKEE AVENUE BLDG.
CORP., et al.,
Appellees

DON F. FABIS,
Intervenor, Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

85
118
315 I.A. 128

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Don F. Fabis sought leave to file his intervening petition in the above entitled cause - a foreclosure proceeding; he sought to have certain members of a bondholders' protective committee, and the trustee, plaintiff, account for their acts and moneys received, and for other relief. The surviving members of the bondholders' protective committee filed an answer, and plaintiff moved to strike the petition; this motion was allowed and the petitioner appeals.

Petitioner alleged that he was the owner of certain bonds aggregating \$3,100, secured by a deed of trust conveying the premises at 1146 Milwaukee avenue; that these bonds were deposited with a bondholders' committee under a deposit agreement dated November 30, 1931, under the terms of which the members of the committee undertook to act as trustees of the depositing bondholders; that foreclosure proceedings were commenced and defendants defaulted; that a decree of foreclosure and sale was entered and the master in chancery ordered to advertise for sale, but the master received no bid and adjourned the sale; that neither the bondholders' committee nor the trustee have ever made any accounting of their acts nor any report of funds received, and that if the trustee and the committee have permitted the owner to collect the income from the property and dissipate it, then they should be compelled to account for the funds lost by reason

CHICAGO TITLE & TRUST COMPANY,
 a corporation,
 Appellee,
 v.
 1148 MILWAUKEE AVENUE BLDG.,
 CORP., et al.,
 Appellees
 DON T. FABIS,
 Intervenor, Appellant.

APPEAL FROM
 SUPERIOR COURT,
 COOK COUNTY.

3151A-128

MR. PRESIDING JUSTICE REGULARLY DELIVERED THE OPINION OF THE COURT.

Don T. Fabis sought leave to file his intervening petition in the above entitled cause - a foreclosure proceeding; he sought to have certain members of a bondholders' protective committee, and the trustee, jointly, account for their acts and money received, and for other relief. The surviving members of the bondholders' protective committee filed an answer, and plaintiff moved to strike the petition; this motion was allowed and the petitioner appeals.

Petitioner alleged that he was the owner of certain bonds aggregating \$3,100, secured by a deed of trust conveying the premises at 1148 Milwaukee Avenue; that these bonds were deposited with a bondholders' committee under a deposit agreement dated November 30, 1931, under the terms of which the members of the committee undertook to act as trustees of the depositing bondholders; that foreclosure proceedings were commenced and defendant defaulted; that a decree of foreclosure and sale was entered and the master in chancery ordered to advertise for sale, but the master received no bid and adjourned the sale; that neither the bondholders' committee nor the trustee have ever made any accounting of their acts nor any report of funds received, and that if the trustee and the committee have permitted the owner to collect the income from the property and disburse it, then they should be compelled to account for the same.

of their failure to impound the rents pledged as further security for the payment of the bonds secured by the trust deed.

The decree of foreclosure, which was entered March 30, 1937, finds that the bondholders' committee, pursuant to the provisions of the trust deed, served a notice upon plaintiff, Chicago Title & Trust Co., trustee, accelerating the maturity of the bonds and demanding that foreclosure proceedings be commenced. The decree further provides that the court reserves jurisdiction of the cause for, among other purposes, the purpose of requiring the plaintiff trustee, from time to time, to make report of all moneys received by it as trustee of the sale, or on account of any deficiency or of rents - the court to take such action upon such reports as the court shall decide, consistent with the terms of the decree.

The intervenor argues the proposition that intervention is allowed after final decree in certain cases. Doubtless under certain circumstances such intervention by a bondholder may be allowed even after a decree. Straus v. Chicago Title & Trust Co., 273 Ill. App. 63. However, the general rule is that the petition of a bondholder to intervene in a foreclosure proceeding will not be granted unless the court acted in plain violation of its discretionary powers. American Nat. Bk. etc. v. Illinois Imp. & Bldg. Corp., 281 Ill. App. 17, 22. And in Hairgrove v. City of Jacksonville, 366 Ill. 163, 184, it was held that to intervene is not an absolute right.

The burden of the intervenor's petition seems to be the desire to have a sale of the property, but the record shows that the court directed the master to offer the property for sale on or before September 27, 1941, so that in this respect the wishes of the intervenor have been met. By the decree the court retained jurisdiction to pass upon the trustee's account.

of their failure to impound the rents placed as further security for the payment of the bonds secured by the trust deed.

The decree of foreclosure, which was entered March 20, 1937, finds that the bondholders' committee, pursuant to the provisions of the trust deed, served a notice upon plaintiff, Chicago Title & Trust Co., trustee, accelerating the maturity of the bonds and demanding that foreclosure proceedings be commenced. The decree further provides that the court reserves jurisdiction of the cause for, among other purposes, the purpose of requiring the plaintiff trustee, from time to time, to make report of all moneys received by it as trustee of the sale, or on account of any deficiency or of rents - the court to take such action upon such reports as the court shall decide, consistent with the terms of the decree.

The intervenor argues the proposition that intervention is allowed after final decree in certain cases, bondholders under certain circumstances such intervention by a bondholder may be allowed even after a decree. Trane v. Chicago Title & Trust Co., 325 Ill. App. 61. However, the general rule is that the petition of a bondholder to intervene in a foreclosure proceeding will not be granted unless the court acted in plain violation of its discretionary powers. American Nat. Bk. etc. v. Illinois Inv. & Bldg. Corp., 311 Ill. App. 17, 32. And in Wainwright v. City of Jacksonville, 336 Ill. 163, 184, it was held that to intervene is not an absolute right.

The burden of the intervenor's petition seems to be the desire to have a sale of the property, but the record shows that the court directed the master to offer the property for sale on or before September 27, 1941, so that in this respect the wishes of the intervenor have been met. By the decree the court retained jurisdiction to pass upon the trustee's account.

The petition does not specify any acts of wrongdoing on the part of either the committee or the trustee. There is only the general charge that they have permitted the owner to collect and dissipate the rents and income from the property and that the committee, with the consent of the trustee, permitted or caused the defendant to convey the property to Tarleton L. Redden, who filed his answer to the complaint to foreclose and consented to the decree of foreclosure. The petition, by innuendo, suggests that Redden has been permitted to collect and dissipate the rents.

A bondholder's petition for intervention requires definiteness and certainty in any charges of neglect, or the like, which are made. Continental & Comm. Tr. & Sav. Bk. v. Allis-Chalmers Co., 200 Fed. 600, 607. And as was said in the American Nat. Bk. case (281 Ill. App. at p. 26) "Conjectures are not helpful in determining the truth of the charge that the acts of the several parties were not for the benefit of the bondholders." The court could properly, for the reasons stated, strike the intervenor's petition.

Finally, the record shows that the petitioner was not the owner of any of the bonds described in his petition. The decree of foreclosure finds that the bondholders' protective committee is the owner of the bonds which the intervenor claims to own. The petition, while it asserts ownership of certain bonds, says that they have been deposited with the bondholders' committee under a deposit agreement; that petitioner has no copy of this agreement and therefore is unable to make a copy "or to allege the substance thereof." In the certificate of deposit held by petitioner it is stated that the petitioner assents to and is bound by the provisions of the deposit agreement. The certificate says that the original of the deposit agreement is on file with the committee, and there is no claim that any demand has been made to permit petitioner to have access to this. A similar

The petition does not specify any acts of wrongdoing on the part of either the committee or the trustee. There is only the general charge that they have permitted the owner to collect and dissipate the rents and income from the property and that the committee, with the consent of the trustee, permitted or caused the defendant to convey the property to Tarrleton L. Redden, who filed his answer to the complaint to foreclose and consented to the decree of foreclosure. The petition, by innuendo, suggests that Redden has been permitted to collect and dissipate the rents. A bondholder's petition for intervention requires definiteness and certainty in any charges of neglect, or the like, which are made. Confidential & Comm. Tr. & Sav. Bk. v. Allied-Chalmers Co., 200 Fed. 600, 607. And as was said in the American Nat. Bk. case (281 Ill. App. at p. 28) "Conjectures are not helpful in determining the truth of the charge that the acts of the several parties were not for the benefit of the bondholders." The court could properly, for the reasons stated, strike the intervenor's petition. Finally, the record shows that the petitioner was not the owner of any of the bonds described in his petition. The decree of foreclosure finds that the bondholders' protective committee is the owner of the bonds which the intervenor claims to own. The petition, while it asserts ownership of certain bonds, says that they have been deposited with the bondholders' committee under a deposit agreement; that petitioner has no copy of this agreement and therefore is unable to make a copy "on the same substance thereof." In the certificate of deposit held by petitioner it is stated that the petitioner assents to and is bound by the provisions of the deposit agreement. The certificate says that the original of the deposit agreement is on file with the committee, and there is no claim that any demand has been made to permit petitioner to have access to this agreement.

situation was involved in Aukopovicz v. Heymann, 300 Ill. App. 243, where a group of bondholders sought to remove members of a bondholders' committee for malfeasance; motions to strike the petition were sustained, and this was affirmed by the Appellate court, following the decision in the case of Chicago T. & T. Co. v. Chief Wash Co., 368 Ill. 146, 153, where it was said that the only way by which the court could reach a conclusion as to the duties of the members of a bondholders' protective committee, would be by examining the deposit agreement and the trust deed providing for the duties of the trustee named in the document. It is well settled that the rights of a holder of a certificate of deposit are limited and defined by the terms of the agreement under which the certificate is issued. Himmel v. Straus, 288 Ill. App. 566; Babcock v. Chicago Rys. Co., 325 Ill. 16.

Petitioner argues that because the number of members of the bondholders' committee has been reduced by death or resignations, such vacancies should be filled. Whether this was necessary was within the discretion of the court, and the intervenor cannot interfere unless it is shown that the fact of the reduced number has worked a hardship.

For the reasons indicated the order of the trial court is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

situation was involved in Whitely v. Whitely, 300 Ill. App. 2d, where a group of bondholders sought to remove members of a bondholders' committee for malfeasance; actions to enforce the petition were sustained, and this was affirmed by the Appellate court, following the decision in the case of Chicago T. & N. Co. v. Chief Wash Co., 308 Ill. 146, 153, where it was held that the only way by which the court could reach a conclusion as to the duties of the members of a bondholders' protective committee would be by examining the deposit agreement and the trust deed providing for the duties of the trustees named in the document. It is well settled that the rights of a holder of a certificate of deposit are limited and defined by the terms of the agreement under which the certificate is issued. Nichols v. Starnes, 308 Ill. App. 2d 586; Barnock v. Chicago Ry. Co., 315 Ill. 12. Petitioner argues that because the number of members of the bondholders' committee has been reduced by death or resignations, such vacancies should be filled. Whether this was necessary was within the discretion of the court, and the intervenor cannot interfere unless it is shown that the fact of the reduced number has worked a hardship.

For the reasons indicated the order of the trial court is affirmed.

41975

JOHN GYURKY,
Appellee,

v.

PULLMAN RAILROAD COMPANY,
a corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

315 I.A. 129

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages sustained when he fell from a freight train of the defendant as it was being moved in its yards at 119th street in Chicago. Upon trial he had a verdict and judgment for \$15,000. Defendant appeals.

Plaintiff's amended complaint alleged that defendant's line of railroad extended across a public street, known as east 119th street; that defendant permitted the public to cross its right-of-way in order to reach Lake Calumet; that the freight train stopped so as to block east 119th street; that plaintiff was walking in a westerly direction and was injured while crossing through the train at this street.

Defendant denied that 119th street was a public street and denied that the railroad company permitted the general public to cross at any places other than the public highway crossings, and alleged that plaintiff's injuries were caused by his own negligence while a trespasser in attempting to climb upon or through the train without the knowledge of the defendant.

The defendant operates a freight yard at the place of the accident. It has six tracks running north and south, approximately in the center of the freight yard. A short distance to the east is the western shore of Lake Calumet. This tract of land was conveyed to the defendant company by deed dated June 1, 1908, which recited that there was reserved 66 feet, to form part of 119th street, but that no public street or highway was opened upon this 66 feet, and defendant in its answer asserted

JOHN J. JAMES, JR.
 Appellee,
 v.
 ILLINOIS RAILROAD COMPANY,
 a corporation,
 Appellant.

SUPREME COURT,
 STATE OF ILLINOIS.

311 A. 2d 111

MR. PRESIDING JUSTICE DELANEY delivered the opinion of the court.

Plaintiff brought suit to recover damages sustained when he fell from a freight train of the defendant as it was being moved in the yards at 119th street in Chicago. Upon trial he had a verdict and judgment for \$1,000. Defendant appeals. Plaintiff's amended complaint alleged that defendant's line of railroad extended across a public street, known as 119th street; that defendant permitted the public to cross its right-of-way in order to reach Lake Calumet; that the freight train stopped so as to block east 119th street; that plaintiff was walking in a westerly direction and was injured while crossing through the train at this street.

Defendant denied that 119th street was a public street and denied that the railroad company permitted the general public to cross at any place other than the public highway crossings, and alleged that plaintiff's injuries were caused by his own negligence while a trespasser in attempting to climb upon or through the train without the knowledge of the defendant. The defendant operated a freight yard at the place of the accident. It has six tracks running north and south, approximately in the center of the freight yard. A short distance to the east is the western shore of Lake Calumet. This tract of land was conveyed to the defendant company by deed dated June 1, 1908, which recited that there was reserved 88 feet, to form part of 119th street, but that no public street or highway was opened upon this 88 feet, and defendant in its answer asserted

that it had not been used as a public or private thoroughfare. Plaintiff filed an amendment to his amended complaint asserting that east 119th street was a public highway and that for the purpose of "convenience" this strip would be called east 119th street. Defendant's president testified that in April 1938, when this accident happened, 41 feet of this 66 foot strip was the property of the Illinois Brick Co., and the other 25 feet was the property of the Pullman Land Association.

Plaintiff testified that he lived on Wentworth avenue, which is some distance west of Pullman; that on the morning of the accident, April 4, 1938, he went to Lake Calumet to see the fishing; that he watched this about an hour and a half and started back, going westward, intending to cross the defendant's tracks at 119th street; that he saw a freight train standing across this street and extending south around a bend so that he could not see the end of it, and north almost to 115th street. At this time he could see neither the head end nor the tail end of the train. He testified that after waiting 15 minutes for the train to pull out he decided to go through the train - between two of the cars, and had just climbed on a coal car and had his foot on the coupling when the train started to move and he fell between the rails. The accident happened about 2 p. m.

Defendant argues that plaintiff was a trespasser who climbed on the car to take coal. Witness Kelderhouse testified that he had spent the morning with plaintiff in one of the shacks on the shores of Lake Calumet; that they were drinking together; that early in the afternoon plaintiff gave him money to go after more whiskey, and when the witness started away plaintiff started westward toward a coal car on the tracks; that after the witness had gone about half a block he looked back and saw plaintiff on the coal car; he heard the cars jerk, looked back, and plain-

that it had not been used as a public or private thoroughfare. Plaintiff filed an amendment to his amended complaint asserting that east 118th street was a public highway and that for the purpose of "convenience" this strip would be called east 118th street. Defendant's present testimony that in April 1936, when this accident happened, 41 feet of this 66 foot strip was the property of the Illinois Brick Co., and the other 25 feet was the property of the Pullman Land Association.

Plaintiff testified that he lived on Centworth Avenue, which is some distance west of Pullman; that on the morning of the accident, April 4, 1936, he went to Lake Calumet to see the fishing; that he watched this about an hour and a half and started back, going westward, intending to cross the defendant's tracks at 118th street; that he saw a freight train standing across this street and extending south around a bend so that he could not see the end of it, and north almost to 118th street. At this time he could see neither the head nor the tail end of the train. He testified that after waiting 15 minutes for the train to pull out he decided to go through the train - between two of the cars, and had just climbed on a coal car and had his foot on the coupling when the train started to move and he fell between the rails. The accident happened about 2 p. m.

Defendant argues that plaintiff was a trespasser who climbed on the car to take coal. Witness Kildebeane testified that he had spent the morning with plaintiff in one of the shacks on the shores of Lake Calumet; that they were drinking together; that early in the afternoon plaintiff gave him money to go after more whiskey, and when the witness started away plaintiff started westward toward a coal car on the tracks; that after the witness had gone about half a block he looked back and saw plaintiff on the coal car; he heard the cars jerk, moved back, and plain-

tiff was no longer on the car; that when he returned he learned that plaintiff had been injured and taken away.

The witness Fiumfredde was the first man to find plaintiff after the accident. Plaintiff was lying on the west side of the train, about two or three hundred feet north of 119th street. The witness took off his belt and tied it about plaintiff's injured leg to prevent further bleeding; he then telephoned from a nearby place to the police station; two police officers came in a patrol wagon and took him away. This witness testified that while plaintiff was lying on the ground he was mumbling something about the coal car.

The two police officers who carried the injured man in an ambulance to the hospital testified that plaintiff told them he climbed on the car to get some coal and was injured when he fell. The car which ran over plaintiff was an open gondola coal car, and one witness testified that after the accident they found a pile of coal lying along the west side of the track.

None of the train crew knew of the presence of plaintiff at or near the train and knew nothing of the accident until they were subsequently told. A railroad company owes no duty to one on its train as a trespasser except to refrain from wilfully or wantonly injuring him. Bremer v. L. E. & W. R. Co., 318 Ill. 11. There was no evidence of any wilful or wanton misconduct on the part of defendant, and the court properly withdrew the paragraph charging this, from the jury. See also Feinberg v. Chicago, B. & Q. R. Co., 300 Ill. App.278, and cases there cited.

Plaintiff charges that defendant was negligent in starting its train without warning and without ascertaining whether there were any persons crossing the railroad at the time and place in question. We hold there was no duty on the defendant to give a signal before starting this train at this particular locality.

It was no longer on the car; that when he returned he learned that plaintiff had been injured and taken away.

The witness testified that the first man to find plaintiff after the accident, plaintiff was lying on the west side

of the train, about two or three hundred feet north of 112th street. The witness took off his belt and tied it about plaintiff's injured leg to prevent further bleeding; he then tele-

phoned from a nearby place to the police station; two police officers came in a patrol wagon and took him away. This witness

testified that while plaintiff was lying on the ground he was mumbled something about the coal car.

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tell. The car which ran over plaintiff was an open gondola coal car, and one witness testified that after the accident they found a pile of coal lying along the west side of the track.

None of the train crew knew of the presence of plaintiff at or near the train and knew nothing of the accident until they were subsequently told. A railroad company owes no duty to one

on the train as a trespasser except to refrain from willfully or wantonly injuring him. Frederick v. L. E. & N. Co., 218 Ill. 11.

There was no evidence of any willful or wanton misconduct on the part of defendant, and the court properly withdrew the question of liability from the jury. See also Keinert v. Chicago & N. W. Ry. Co., 300 Ill. 478, and cases there cited.

Plaintiff charges that defendant was negligent in starting the train without warning and without ascertaining whether there were any persons crossing the railroad at the time and place in question. He holds there was no duty on the defendant to give

signal before starting this train at this particular locality.

The place was a railroad yard in the midst of a prairie. 119th street, to a point approximately 50 feet west of defendant's tracks, had been impassable for years. Photographs of the place in the record show that this was not a travelled street but a rough, unpaved pathway. It was in evidence that the only persons using it was an occasional fisherman, and no evidence that they customarily climbed between the cars. The train crew could hardly be expected to search the train to ascertain if anyone was attempting to cross between the cars at this point.

In the Feinberg case, supra, the facts are much like those in the instant case. There, as here, plaintiff lost his leg when attempting to pass through an open space between two freight cars in the railroad yards when the cars moved without warning. The opinion in that case examines the facts in great detail and cites many cases, and holds that plaintiff was a trespasser and concludes (page 296): "Viewing the evidence in the most favorable light for plaintiff, it seems apparent to us that the unfortunate accident to plaintiff was due solely to his own negligence."

Plaintiff's own testimony supports the conclusion that the accident happened because of his negligence. He testified that when he left Lake Calumet he walked southwest and was a block or two north of 119th street when he saw the train blocking the crossing. From this point he had a safe route to cross westward of the tracks by going north to Kensington avenue, which is half a block south of 115th street and which is a recognized public thoroughfare, and could cross safely north of the train. He also said it took him 10 or 15 minutes to reach 119th street, although he saw it blocked by the train, and that he waited there 15 or 20 minutes - so that approximately a half hour elapsed from the time he saw the street was blocked until he started to

The place was a railroad yard in the night of a prairie. Light street, to a point approximately 50 feet west of defendant's tracks, had been impassable for years. Photographs of the place in the record show that this was not a travelled street but a rough, unpaved pathway. It was in evidence that the only persons using it was an occasional fisherman, and no evidence that they customarily climbed between the cars. The train crew could hardly be expected to search the train to ascertain if anyone was attempting to cross between the cars at this point.

In the Felipe case, supra, the facts are much like those in the instant case. There, as here, plaintiff lost his leg when attempting to pass through an open space between two freight cars in the railroad yards when the cars moved without warning. The opinion in that case examines the facts in great detail and cites many cases, and holds that plaintiff was a trespasser and contributor (page 298): "Viewing the evidence in the most favorable light for plaintiff, it seems apparent to us that the unfortunate accident to plaintiff was due solely to his own negligence."

Plaintiff's own testimony supports the conclusion that the accident happened because of his negligence. He testified that when he left Lake Calumet he walked southwest and was a block or two north of 11th street when he saw the train blocking the crossing. From this point he had a safe route to cross westward of the tracks by going north to Kensington Avenue, which is half a block south of 11th street and which is a recognized public thoroughfare, and could cross safely north of the train. He also said it took him 10 or 15 minutes to reach 11th street, although he saw it blocked by the train, and that he waited there 15 or 20 minutes - so that approximately a half hour elapsed from the time he saw the street was blocked until he started to

go between the cars. He evidently expected that an engine would be attached, for he testified that he waited at 119th street for 15 or 20 minutes until the train could pull out.

By statute persons are forbidden to climb on railroad engines or cars, either stationary or in motion, unless he shall be acting in compliance with law or by permission of the corporation owning or managing the railroad. Ch. 114, par. 72, Ill. Rev. Stats. 1941.

Plaintiff relies largely upon the opinion in Lerette v. Director General of Railroads, 306 Ill. 348. The facts in that case are distinguishable from those now before us. There the crossing was on a public street in a city, not an impassable street intersecting a railroad yard. Neither was it shown that Lerette had any other way except to climb between the cars to cross at that point. In that case the accident happened after 1 o'clock in the morning, and it was in evidence that cars frequently stood across the street from midnight until morning, whereas in the present case the accident happened in the railroad yards in the early afternoon, when, according to plaintiff's own testimony, he expected the train to pull out.

We are of the opinion that plaintiff, whether he climbed upon the coal car for the purpose of taking coal from it or merely was attempting to pass between the cars, was a trespasser, and defendant owed him no duty except to refrain from wilfully and wantonly injuring him, and as there was no evidence supporting this charge the judgment cannot stand. It will therefore be reversed without remanding the cause.

REVERSED.

Matchett and O'Connor, JJ., concur.

go between the cars. He evidently expected that an engine would be attached, for he testified that he waited at 110th street for 15 or 20 minutes until the train could pull out.

By statute persons are forbidden to climb on railroad engines or cars, either stationary or in motion, unless he shall be acting in compliance with law or by permission of the corporation owning or managing the railroad. Ch. 114, par. 70, Ill. Rev. Stats. 1941.

Plaintiff relies largely upon the opinion in Larette v. Director General of Railroads, 308 Ill. 548. The facts in that case are distinguishable from those now before us. There the crossing was on a public street in a city, not an impassable street intersecting a railroad yard. Neither was it shown that Larette had any other way except to climb between the cars to cross at that point. In that case the accident happened after 1 o'clock in the morning, and it was in evidence that cars frequently stood across the street from midnight until morning, whereas in the present case the accident happened in the railroad yards in the early afternoon, when, according to plaintiff's own testimony, he expected the train to pull out.

We are of the opinion that plaintiff, whether he climbed upon the coal car for the purpose of taking coal from it or merely was attempting to pass between the cars, was a trespasser, and defendant owed him no duty except to refrain from willfully and wantonly injuring him, and as there was no evidence supporting this charge the judgment cannot stand. It will therefore be reversed without regarding the cause.

REVEREND.

41985

BELLE BARON,
Appellee,

v.

PRUDENCE LIFE INSURANCE CO.,
a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

87
120
315 I.A. 129

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover hospital and surgical expenses on a policy issued by the defendant, and upon trial by the court had judgment for \$145.20, from which defendant appeals.

Plaintiff testified as to her illness and her hospitalization and appendix operation. The amount of the expenses was stipulated.

Defendant admits the issuance of the policy to plaintiff, but relies for defense upon two provisions. First, that plaintiff can recover indemnity after a policy has lapsed and is reinstated only for such sickness as may begin more than ten days after the date of reinstatement. The policy was issued May 3, 1940, and lapsed for non-payment of premium on December 10, 1940, but was reinstated by the payment of premium on December 17, 1940. Defendant argues that plaintiff's illness began on December 27, the tenth day after reinstatement. Plaintiff testified that on December 27 she went to a friend's house to play mahjongg and did not feel any pains at all that night; the next day she suffered abdominal pains, and called on the doctor on December 29 and was then taken to a hospital, and was operated on for appendicitis January 2, 1941. The court could properly conclude that her illness began on December 28, which was more than ten days after the policy had been reinstated.

The court properly excluded a document offered by defendant, said to be made by Dr. Sapoznik, which purported to include

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GOALING TO

entitled "The History of the State of New York," by John B. Albee, published in 1897.

statements made by plaintiff tending to contradict her testimony as to when she was first taken ill. The document offered was not identified by anyone connected with it. There was no attempt made to show that it had been made in the regular and due course of business. Moreover, Dr. Sapoznik was present at the trial, yet was not called to identify the document or to support any of the statements it contained.

Defendant also presents as a defense a provision of the policy that covers sickness which involves an operation when the policy "has been maintained in continuous force without default for not less than six months from the date of issue of the policy." Defendant says that since the policy had lapsed for the non-payment of premiums, although reinstated December 17, 1940, it was not "in continuous force without default for" the period named.

To this there are two answers. When the policy was reinstated it was restored to its former position, as if there had been no default. The meaning of the word "reinstated" as given in the standard dictionaries is, "to reestablish," which manifestly means to restore to its former position.

Moreover, the provision of the policy first noted above provides that where default is made in any installment of premium, the reinstatement of the policy shall cover sickness which "may begin more than ten days after the date" of such reinstatement. There is no limitation on the type of sickness, but includes sickness which may or may not involve an operation. The only limitation of liability under this provision is that the sickness must begin more than ten days after the date of reinstatement. The illness of plaintiff began more than ten days after the policy was reinstated.

If there is any conflict between this provision and the "six months without default" provision, above quoted, the well

-2-

statements made by plaintiff tending to contradict her testimony as to when she was first taken ill. The document offered was not identified by anyone connected with it. There was no attempt made to show that it had been made in the regular and due course of business. Moreover, Dr. Lepornik was present at the trial, yet was not called to identify the document or to support any of the statements it contained.

Defendant also presents as a defense a provision of the policy that covers sickness which involves an operation when the policy "has been maintained in continuous force without default for not less than six months from the date of issue of the policy." Defendant says that since the policy had lapsed for the non-payment of premiums, although reinstated December 17, 1940, it was not "in continuous force without default for" the period named. To this there are two answers. First the policy was reinstated it was restored to its former position, as if there had been no default. The meaning of the word "reinstated" as given in the standard dictionaries is, "to re-establish," which manifestly means to restore to its former position.

Moreover, the provision of the policy first noted above provides that where default is made in any installment of premium the reinstatement of the policy shall cover sickness which "may begin more than ten days after the date" of such reinstatement. There is no limitation on the type of sickness, but includes sickness which may or may not involve an operation. The only limitation of liability under this provision is that the sickness must begin more than ten days after the date of reinstatement. The illness of plaintiff began more than ten days after the policy was reinstated.

If there is any conflict between this provision and the "six months without default" provision, above quoted, the well

-3-

known rule must be applied that the terms of a policy must be construed most strictly against the party which issues it.

Cottingham v. Nat. Church Ins. Co., 290 Ill. 26; Hoffner v. Reinberg, 296 Ill. App. 5.

The judgment of the court was proper and is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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known rule must be applied that the terms of a policy must be construed most strictly against the party which issues it. Cottigian v. Nat. Church Ins. Co., 280 Ill. 38; Reiner v. Fairbank, 280 Ill. App. 5. The judgment of the court was proper and is affirmed.

AFFIRMED.

WATCHETT and O'CONNOR, JJ., concur.

41988

MARY MARGARET REGAN,
Appellee,

v.

FRANCIS KEATING, THOMAS KENNEDY
and JOHN FRANZEN doing business
as TEBO & SLIM, and WILLIAM O.
KINBERG,
Defendants.

On Appeal of FRANCIS KEATING, JOHN
FRANZEN and WILLIAM O. KINBERG,
Appellants.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

315 I.A. 130

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries received when she was struck by an automobile owned and operated by Francis Keating. In one count she alleged that Keating was intoxicated at the time, having bought intoxicating liquors in a saloon owned and run by defendants Thomas Kennedy and John Franzen, in a building owned by defendant William O. Kinberg. Before trial the death of defendant Thomas Kennedy was suggested and the cause was dismissed as to him.

The jury returned a verdict finding defendants guilty and, to a special interrogatory as to whether Keating was guilty of wilful and wanton conduct in the management and operation of his car, answered in the affirmative. Plaintiff's damages were assessed at \$6,500. Judgment was entered on the verdict, and from this defendants Keating, Franzen and Kinberg appeal.

The accident happened on Saturday night, December 17, 1938, near the northeast corner of the intersection of Wentworth avenue, which runs north and south, and the eastward drive of Garfield boulevard (sometimes known as 55th street) in Chicago.

Wentworth avenue is 52 feet wide and there are street car tracks in the center; Garfield boulevard has an eastbound drive and a westbound drive, each 40 feet wide and divided in

MARY MARGARET REAGAN,
Appellee,

v.

FRANCIS KEATING, THOMAS KENNEDY
and JOHN FRANZEN, doing business
as TRO & BRIM, and WILLIAM O.
KIMBERG,
Defendants.

On Appeal of FRANCIS KEATING, JOHN
FRANZEN and WILLIAM O. KIMBERG,
Appellants.

APPEAL FROM
CIRCUIT COURT,
CLACK COUNTY.

3151 A. 180

MR. PRESIDING JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries received when she was struck by an automobile owned and operated by Francis Keating. In one count she alleged that Keating was intoxicated at the time, having bought intoxicating liquors in a saloon owned and run by defendants Thomas Kennedy and John Franzen, in a building owned by defendant William O. Kimberg. Before trial the death of defendant Thomas Kennedy was suggested and the cause was dismissed as to him.

The jury returned a verdict finding defendants guilty and, to a special interrogatory as to whether Keating was guilty of willful and wanton conduct in the management and operation of his car, answered in the affirmative. Plaintiff's damages were assessed at \$500. Judgment was entered on the verdict, and from this defendants Keating, Franzen and Kimberg appeal.

The accident happened on Saturday night, December 17, 1938, near the northeast corner of the intersection of North 4th Avenue, which runs north and south, and the eastward drive of Northfield boulevard (sometimes known as 55th street) in Chicago.

North 4th Avenue is 52 feet wide and there are street car tracks in the center; Northfield boulevard has an eastbound drive and a westbound drive, each 40 feet wide and divided in

the center of the boulevard with a parkway 90 feet wide; the south drive is for eastbound traffic only, and the north drive is for westbound traffic; there are traffic lights on the south-east, southwest and northwest corners of the intersection.

Plaintiff was unmarried, 19 years of age, residing with her parents on LaSalle street, which is one block east of Wentworth avenue. Defendant Keating, the owner and operator of the automobile, was also unmarried and 24 years of age at the time of the accident; he was a truck driver by occupation and resided on Wells street, which is one block west of Wentworth avenue. The Dram Shop defendants were John Franzen, the surviving partner and operator of the tavern at 5703 Wentworth avenue, and William O. Kinberg, the owner of the tavern premises.

The determination of this appeal involves, almost entirely, questions of fact.

Plaintiff testified that she and a friend, Patrick Connolly, on the evening in question had attended a movie theatre which was located on the west side of Wentworth avenue, north of Garfield boulevard; that they left the theatre at about 11:15 p. m., walking south on the west side of Wentworth until they reached the intersection at the east drive of Garfield boulevard; that at this time the traffic signal lights were green for eastbound traffic; that she looked and saw no traffic coming from any direction; that she and Connolly then proceeded to walk across Wentworth avenue from west to east, a few feet north of the north curb of the east drive of Garfield boulevard; that she was walking on Connolly's right and that she heard no horn; that when they reached a point about three-quarters of the way across the street and near the east rail of the northbound street car tracks on Wentworth she saw the headlights of an automobile approaching from the west coming upon them around the corner from the east drive on Garfield and making a left turn into Wentworth; that

the center of the boulevard with a parkway 90 feet wide; the south drive is for eastbound traffic only, and the north drive is for westbound traffic; there are traffic lights on the south-east, southwest and northwest corners of the intersection.

Plaintiff was unmarried, 19 years of age, residing with her parents on Lasalle street, which is one block east of north avenue. Defendant Keating, the owner and operator of the automobile, was also unmarried and 14 years of age at the time of the accident; he was a truck driver by occupation and resided on Ellis street, which is one block west of north avenue. The Dram Shop defendants were John Brennan, the surviving partner and operator of the tavern at 5703 Westworth avenue, and William O. Kinberg, the owner of the tavern premises.

The determination of this appeal involves, almost entirely, questions of fact.

Plaintiff testified that she and a friend, Patrick Connolly, on the evening in question had attended a movie theatre which was located on the west side of Westworth avenue, north of Garfield boulevard; that they left the theatre at about 11:15 p. m., walking south on the west side of Westworth until they reached the intersection at the east drive of Garfield boulevard; that at this time the traffic signal lights were green for eastbound traffic; that she looked and saw no traffic coming from any direction; that she and Connolly then proceeded to walk across Westworth avenue from west to east, a few feet north of the north curb of the east drive of Garfield boulevard; that she was walking on Connolly's right and that she heard no horn; that when they reached a point about three-quarters of the way across the street and near the east rail of the northbound street car track on Westworth she saw the headlights of an automobile approaching from the west coming upon them around the corner from the east

both she and Connolly were hit and knocked down by the automobile which was driven by defendant Keating.

Connolly testified to the same effect, that they were walking east, intending to go to plaintiff's home at 5650 LaSalle; that the automobile knocked him about 3 or 4 feet and that he did not know how far plaintiff was knocked, but that after the collision she was lying on the street about 3 or 4 feet from the east curb of Wentworth avenue. Keating's car proceeded about 15 feet after it hit them, and came to a stop facing in a north-westerly direction. Connolly was angry and ran towards the driver in a threatening manner and then saw that it was Keating, whom he had known for 13 or 14 years.

Four other witnesses, young men, all of whom had known Keating for 12 to 16 years and who were over at the southeast corner of Garfield boulevard and walking in a northerly direction on Wentworth, saw the accident and testified confirming the testimony of plaintiff and Connolly; that Keating's car did not stop before making the turn into Wentworth and was driving 30 to 35 miles an hour; that the right front headlight and fender of Keating's car struck the plaintiff; that the glass of the headlight was smashed and the fender slightly dented; that after striking plaintiff Keating's car continued on and scraped or "clipped" another car going south in the southbound street car tracks on Wentworth. They ran across the east drive and interfered with the argument between Connolly and Keating. Plaintiff was then put into Keating's car and taken to St. Bernard's Hospital, which was only a short distance away.

Defendant Keating was the only eye witness to the accident testifying on behalf of the defendants. He says he was driving his automobile in an easterly direction on the eastbound drive of Garfield boulevard at about 11:40 p. m. and that as he was turning his car left in a northerly direction into Wentworth his

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both she and Connolly were hit and knocked down by the automobile which was driven by defendant Keating.

Connolly testified to the same effect, that they were walking east, intending to go to plaintiff's home at 5050 La Salle; that the automobile knocked him about 3 or 4 feet and that he did not know how far plaintiff was knocked, but that after the collision she was lying on the street about 3 or 4 feet from the east curb of Wentworth Avenue. Keating's car proceeded about 15 feet after it hit them, and came to a stop facing in a north-westerly direction. Connolly was angry and ran towards the driver in a threatening manner and then saw that it was Keating, whom he had known for 15 or 16 years.

Four other witnesses, young men, all of whom had known Keating for 12 to 16 years and who were over at the southeast corner of Garfield Boulevard and walking in a northerly direction on Wentworth, saw the accident and testified confirming the testimony of plaintiff and Connolly; that Keating's car did not stop before making the turn into Wentworth and was driving 30 to 35 miles an hour; that the right front headlight and fender of Keating's car struck the plaintiff; that the glass of the headlight was smashed and the fender slightly dented; that after striking plaintiff Keating's car continued on and scraped or "clipped" another car going south in the southbound street car tracks on Wentworth. They ran across the east drive and interfered with the argument between Connolly and Keating. Plaintiff was then put into Keating's car and taken to St. Bernard's Hospital, which was only a short distance away.

Defendant Keating was the only eye witness to the accident testifying on behalf of the defendant. He says he was driving his automobile in an easterly direction on the eastbound drive of Garfield Boulevard at about 11:40 p. m. and that as he was turning his car left in a northerly direction into Wentworth he

car came into contact with the plaintiff; that the glass in his right front headlight was broken; he also said his car had "clipped" another car, which was in the southbound traffic lane on Wentworth; he admitted Connolly got up and started towards him as if intending to fight when the four young men ran across the street and interfered.

Keating's testimony was in many respects in direct conflict with the testimony of all the other eye witnesses. He said his car did not strike the plaintiff, although his headlight came in contact with her; that a few seconds before this he saw plaintiff walking off the east side of Wentworth, going west; that she was running from the east curb and running west; that his car was going about 7 miles an hour; that he could stop in about 2 feet, and "I think I did that;" that his car had already stopped when plaintiff stumbled and ran into his car and broke the front headlight; he testified that plaintiff's "left elbow hooked against the bumper. That is the only part of her body that struck my car."

There were many inconsistencies in Keating's testimony, and counsel for plaintiff make the point as to how her back was injured if it was only her left elbow that struck Keating's car. Moreover, if as plaintiff and Connolly testified, they were coming from the movie theatre which was on the west side of Wentworth avenue, intending to go to plaintiff's home on LaSalle street, which is one block east of Wentworth, it would hardly be believed that they crossed Wentworth, "running from the east curb and running west," as Keating testified. It would be more natural that they would cross from west to east.

There was testimony of statements made in the hospital as to how the accident happened. A police officer testified that plaintiff had said that "she was crossing from the north to the

MARY MARGARET REGAN,
Appellee,

v.

FRANCIS KEATING, THOMAS KENNEDY
and JOHN FRANZEN, doing business
as TRO & ELLIM, and WILLIAM O.
KINBERG,

Defendants.

On Appeal of FRANCIS KEATING, JOHN
FRANZEN and WILLIAM O. KINBERG,
Appellants.

APPEAL FROM

OF THE
CIRCUIT COURT,
COOK COUNTY.

81-1-A-180

MR. PRESIDING JUSTICE MCGURRY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal

injuries received when she was struck by an automobile owned
and operated by Francis Keating. In one count she alleged that
Keating was intoxicated at the time, having bought intoxicating
liquors in a saloon owned and run by defendants Thomas Kennedy
and John Franzen, in a building owned by defendant William O.
Kinberg. Before trial the death of defendant Thomas Kennedy
was suggested and the cause was dismissed as to him.

The jury returned a verdict finding defendants guilty
and, to a special interrogatory as to whether Keating was guilty
of willful and wanton conduct in the management and operation of
his car, answered in the affirmative. Plaintiff's damages were
assessed at \$6,500. Judgment was entered on the verdict, and from
this defendants Keating, Franzen and Kinberg appeal.

The accident happened on Saturday night, December 17, 1938,
near the northeast corner of the intersection of Wentworth Avenue,
which runs north and south, and the eastward drive of Winfield
boulevard (sometimes known as 55th street) in Chicago.
Wentworth Avenue is 32 feet wide and there are street
car tracks in the center; Winfield boulevard has an eastbound
drive and a westbound drive, each 40 feet wide and divided in

the center of the boulevard with a parkway 90 feet wide; the south drive is for eastbound traffic only, and the north drive is for westbound traffic; there are traffic lights on the southeast, southwest and northwest corners of the intersection.

Plaintiff was unmarried, 19 years of age, residing with her parents on LaSalle street, which is one block east of Wentworth avenue. Defendant Keating, the owner and operator of the automobile, was also unmarried and 24 years of age at the time of the accident; he was a truck driver by occupation and resided on Wells street, which is one block west of Wentworth avenue. The Dram Shop defendants were John Franzen, the surviving partner and operator of the tavern at 5703 Wentworth avenue, and William O. Kinberg, the owner of the tavern premises.

The determination of this appeal involves, almost entirely, questions of fact.

Plaintiff testified that she and a friend, Patrick Connolly, on the evening in question had attended a movie theatre which was located on the west side of Wentworth avenue, north of Garfield boulevard; that they left the theatre at about 11:15 p. m., walking south on the west side of Wentworth until they reached the intersection at the east drive of Garfield boulevard; that at this time the traffic signal lights were green for eastbound traffic; that she looked and saw no traffic coming from any direction; that she and Connolly then proceeded to walk across Wentworth avenue from west to east, a few feet north of the north curb of the east drive of Garfield boulevard; that she was walking on Connolly's right and that she heard no horn; that when they reached a point about three-quarters of the way across the street and near the east rail of the northbound street car tracks on Wentworth she saw the headlights of an automobile approaching from the west coming upon them around the corner from the east drive on Garfield and making a left turn into Wentworth; that

the center of the boulevard with a turn 90 feet wide; the south drive is for eastbound traffic only, and the north drive is for westbound traffic; there are traffic lights on the south-east, southwest and northwest corners of the intersection. Plaintiff was unmarried, 19 years of age, residing with her parents on Lathrop street, which is one block east of north avenue. Defendant Keating, the owner and operator of the automobile, was also unmarried and 21 years of age at the time of the accident; he was a truck driver by occupation and resided on Wells street, which is one block west of north avenue. The dram shop defendants were John Brennan, the surviving partner and operator of the tavern at 5703 North Avenue, and William O. Kinberg, the owner of the tavern premises. The determination of this appeal involves, almost entirely, questions of fact. Plaintiff testified that she and a friend, Patrick Connolly, on the evening in question had attended a movie theatre which was located on the west side of north avenue, north of Garfield boulevard; that they left the theatre at about 11:15 p. m., walking south on the west side of north avenue until they reached the intersection at the east drive of Garfield boulevard; that at this time the traffic signal lights were green for eastbound traffic; that she looked and saw no traffic coming from any direction; that she and Connolly then proceeded to walk across North Avenue from west to east, a few feet north of the north curb of the east drive of Garfield boulevard; that she was walking on Connolly's right and that she heard no horn; that when they reached a point about three-quarters of the way across the street and near the east rail of the northbound street car tracks on North Avenue she saw the headlight of an automobile approaching from the west coming upon them from the corner from the east

both she and Connolly were hit and knocked down by the automobile which was driven by defendant Keating.

Connolly testified to the same effect, that they were walking east, intending to go to plaintiff's home at 5650 LaSalle; that the automobile knocked him about 3 or 4 feet and that he did not know how far plaintiff was knocked, but that after the collision she was lying on the street about 3 or 4 feet from the east curb of Wentworth avenue. Keating's car proceeded about 15 feet after it hit them, and came to a stop facing in a north-westerly direction. Connolly was angry and ran towards the driver in a threatening manner and then saw that it was Keating, whom he had known for 13 or 14 years.

Four other witnesses, young men, all of whom had known Keating for 12 to 16 years and who were over at the southeast corner of Garfield boulevard and walking in a northerly direction on Wentworth, saw the accident and testified confirming the testimony of plaintiff and Connolly; that Keating's car did not stop before making the turn into Wentworth and was driving 30 to 35 miles an hour; that the right front headlight and fender of Keating's car struck the plaintiff; that the glass of the headlight was smashed and the fender slightly dented; that after striking plaintiff Keating's car continued on and scraped or "clipped" another car going south in the southbound street car tracks on Wentworth. They ran across the east drive and interfered with the argument between Connolly and Keating. Plaintiff was then put into Keating's car and taken to St. Bernard's Hospital, which was only a short distance away.

Defendant Keating was the only eye witness to the accident testifying on behalf of the defendants. He says he was driving his automobile in an easterly direction on the eastbound drive of Garfield boulevard at about 11:40 p. m. and that as he was turning his car left in a northerly direction into Wentworth his

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Connolly testified to the same effect, that they were walking east, intending to go to plaintiff's home at 5550 La Salle; that the automobile knocked him about 3 or 4 feet and that he did not know how far plaintiff was knocked, but that after the collision she was lying on the street about 3 or 4 feet from the east curb of Wentworth Avenue. Keating's car proceeded about 15 feet after it hit them, and came to a stop facing in a northerly direction. Connolly was angry and ran towards the driver in a threatening manner and then saw that it was Keating, whom he had known for 13 or 14 years.

Four other witnesses, young men, all of whom had known Keating for 13 to 15 years and who were over at the southeast corner of Garfield Boulevard and walking in a northerly direction on Wentworth, saw the accident and testified confirming the testimony of plaintiff and Connolly; that Keating's car did not stop before making the turn into Wentworth and was driving 30 to 35 miles an hour; that the right front headlight and fender of Keating's car struck the plaintiff; that the glass of the headlight was smashed and the fender slightly dented; that after striking plaintiff Keating's car continued on and escaped or "clipped" another car going south in the southbound street car tracks on Wentworth. They ran across the east drive and interfered with the argument between Connolly and Keating. Plaintiff was then put into Keating's car and taken to St. Bernard's Hospital, which was only a short distance away.

Defendant Keating was the only eye witness to the accident testifying on behalf of the defendant. He says he was driving his automobile in an easterly direction on the eastbound drive of Garfield Boulevard at about 11:40 p. m. and that as he was turning his car left in a northerly direction into Wentworth his

car came into contact with the plaintiff; that the glass in his right front headlight was broken; he also said his car had "clipped" another car, which was in the southbound traffic lane on Wentworth; he admitted Connolly got up and started towards him as if intending to fight when the four young men ran across the street and interfered.

Keating's testimony was in many respects in direct conflict with the testimony of all the other eye witnesses. He said his car did not strike the plaintiff, although his headlight came in contact with her; that a few seconds before this he saw plaintiff walking off the east side of Wentworth, going west; that she was running from the east curb and running west; that his car was going about 7 miles an hour; that he could stop in about 2 feet, and "I think I did that;" that his car had already stopped when plaintiff stumbled and ran into his car and broke the front headlight; he testified that plaintiff's "left elbow hooked against the bumper. That is the only part of her body that struck my car."

There were many inconsistencies in Keating's testimony, and counsel for plaintiff make the point as to how her back was injured if it was only her left elbow that struck Keating's car. Moreover, if as plaintiff and Connolly testified, they were coming from the movie theatre which was on the west side of Wentworth avenue, intending to go to plaintiff's home on LaSalle street, which is one block east of Wentworth, it would hardly be believed that they crossed Wentworth, "running from the east curb and running west," as Keating testified. It would be more natural that they would cross from west to east.

There was testimony of statements made in the hospital as to how the accident happened. A police officer testified that plaintiff had said that "she was crossing from the north to the

our case into contact with the plaintiff; that the glass in his right front headlight was broken; he also said his car had "skidded" another car, which was in the southbound traffic lane on Westworth; he admitted Connolly got up and started towards him as if intending to fight when the four young men ran across the street and intervened.

Keating's testimony was in many respects in direct conflict with the testimony of all the other eye witnesses. He said his car did not strike the plaintiff, although his headlight came in contact with her; that a few seconds before this he saw plaintiff walking off the east side of Westworth, going west; that she was running from the east curb and running west; that his car was going about 7 miles an hour; that he could stop in about 2 feet, and "I think I did that;" that his car had already stopped when plaintiff stumbled and ran into his car and broke the front headlight; he testified that plaintiff's "left elbow hooked against the bumper. That is the only part of her body that struck my car."

There were many inconsistencies in Keating's testimony, and counsel for plaintiff took the point as to how her back was injured if it was only her left elbow that struck Keating's car. However, it is plaintiff and Connolly testified, they were coming from the movie theatre which was on the west side of Westworth avenue, intending to go to plaintiff's home on Lafayette street, which is one block east of Westworth, it would hardly be believed that they crossed Westworth, "running from the east curb and running west," as Keating testified. It would be more natural that they could cross from west to east.

There was testimony of statements made in the hospital as to how the accident happened. A police officer testified that plaintiff had said that "she was crossing from the north to the

south curb and slipped and hurt her spine." There was no evidence or testimony tending to confirm the report of this officer, and it is evident that the statement that she slipped while crossing from the north to the south side of the drive was inaccurate.

Defendants argue that plaintiff was guilty of contributory negligence in looking for traffic and not seeing any. The jury found Keating guilty of wilful and wanton misconduct in the operation of his automobile, hence any contributory negligence would not prevent a recovery. Moreover, if defendant Keating was driving at 30 or 35 miles per hour, as testified to by more than one witness, his car would be far to the westward of Wentworth, and in crossing, plaintiff's back would be in this direction. She could hardly be called guilty of contributory negligence in not anticipating that a car would swing around the corner at a high rate of speed without any warning. The jury could properly conclude that the manifest weight of the evidence showed that plaintiff was injured by the reckless and negligent manner in which defendant Keating was driving his automobile.

Plaintiff also alleged in her complaint that Keating had been drinking intoxicating liquors in the tavern owned and operated by Kennedy and Franzen. There was ample evidence that Keating was in the tavern for over an hour immediately prior to the accident and was drinking liquor sold and served to him by defendant Franzen, and that at the time of the accident he was intoxicated.

Three witnesses - Flood, Rabig and Novossel, testified they had known Keating for many years; they were in the tavern which is on the east side of Wentworth avenue, two blocks south of Garfield boulevard; they arrived there about 10 or 10:15 p. m. and were playing cards at a table; they saw Keating in the tavern while they were there and saw him pay for shots of whiskey and beer which were served to him by defendant Franzen. These witnesses testified that in their opinion Keating was intoxicated -

south curb and alighted and hurt her spine." There was no evidence or testimony tending to confirm the report of this officer, and it is evident that the statement that she alighted while crossing from the north to the south side of the drive was inaccurate. Defendants argue that plaintiff was guilty of contributory negligence in looking for traffic and not seeing any. The jury found Keating guilty of willful and wanton misconduct in the operation of his automobile, hence any contributory negligence would not prevent a recovery. Moreover, if defendant Keating was driving at 30 or 35 miles per hour, as testified to by more than one witness, his car would be far to the westward of the intersection, and in crossing, plaintiff's back would be in this direction. She could hardly be called guilty of contributory negligence in not anticipating that a car would swing around the corner at a high rate of speed without any warning. The jury could properly conclude that the manifest weight of the evidence showed that plaintiff was injured by the recklessness and negligent manner in which defendant Keating was driving his automobile.

Plaintiff also alleged in her complaint that Keating had been drinking intoxicating liquors in the tavern owned and operated by Kennedy and Brennan. There was ample evidence that Keating was in the tavern for over an hour immediately prior to the accident and was drinking liquor sold and served to him by defendant Brennan, and that at the time of the accident he was intoxicated. Three witnesses - Flood, Kadig and Novosel, testified they had known Keating for many years; they were in the tavern which is on the east side of Wentworth Avenue, two blocks south of Garfield Boulevard; they arrived there about 10 or 10:15 p. m. and were playing cards at a table; they saw Keating in the tavern while they were there and saw him pay for shots of whiskey and beer which were served to him by defendant Brennan. These witnesses testified that in their opinion Keating was intoxicated -

his eyes bloodshot, his hair dishevelled, and he staggered and wobbled as he walked. Another witness, Francis Birmingham, had known Keating for approximately 15 years; he was in a back room of the tavern dancing and came out into the barroom at 10:30 and saw the witnesses above named playing cards; he saw Keating leaning against the bar and saw him drink whiskey and beer; that he returned to the back room and later came out and Keating's glasses had been refilled and Keating drank from both of them; he staggered against another man standing next to him at the bar, and Birmingham gave it as his opinion that Keating was intoxicated.

The three witnesses first above named were walking from the tavern towards Garfield boulevard and saw Keating swing his car into Wentworth, striking plaintiff and Connally. They described Keating's appearance when he got out of his car after the accident. He spoke incoherently and was staggering around the street; he drove them to the hospital and weaved in and out of traffic and was cautioned not to go so fast. On the way to the hospital Keating told these witnesses not to say that he hit the plaintiff and that he would pay the bills. He talked to Dr. Ryan, who was in the emergency service at St. Bernard's hospital, administering first aid to plaintiff. The doctor heard Keating swearing and smelled alcohol on his breath. Keating told the doctor that he was the cousin of plaintiff.

After leaving plaintiff at the hospital Keating and Connolly went to a cafe nearby where defendant had two cups of black coffee and bought some chewing gum, and while there saw a Miss Larson, who knew both plaintiff and Keating; he told her he had just hit plaintiff and asked her to go with him to the home of plaintiff's mother and tell her about the accident. The three persons then got into Keating's car and went to plaintiff's home, and there Miss Larson told Mrs. Regan, in Keating's presence, that plaintiff had been hit by Keating. Mrs. Regan was then

his eyes bloodshot, his hair disheveled, and he staggered and wobbled as he walked. Another witness, Francis Birmingham, known Kesting for approximately 15 years; he was in a back room of the tavern dancing and came out into the barroom at 10:30 and saw the witnesses above named playing cards; he saw Kesting leaning against the bar and saw him drink whiskey and beer; that he returned to the back room and later came out and Kesting's glasses had been refilled and Kesting drank from both of them; he staggered against another man standing next to him at the bar, and Birmingham gave it as his opinion that Kesting was intoxicated. The three witnesses first above named were walking from the tavern towards Garfield boulevard and saw Kesting swing his car into Wentworth, striking plaintiff and Connolly. They described Kesting's appearance when he got out of his car after the accident. He spoke incoherently and was staggering around the street; he drove them to the hospital and weaved in and out of traffic and was cautioned not to go so fast. On the way to the hospital Kesting told these witnesses not to say that he hit the plaintiff and that he would pay the bill. He talked to Dr. Ryan, who was in the emergency service at St. Bernard's hospital, administering first aid to plaintiff. The doctor heard Kesting swearing and smelled alcohol on his breath. Kesting told the doctor that he was the cousin of plaintiff. After leaving plaintiff at the hospital Kesting and Connolly went to a cafe nearby where defendant had two cups of black coffee and fought over driving him, and while there saw a Miss Larson, who knew both plaintiff and Kesting; he told her he had just hit plaintiff and asked her to go with him to the home of plaintiff's mother and tell her about the accident. The three persons then got into Kesting's car and went to plaintiff's home, and there Miss Larson told that Kesting, in Kesting's presence,

taken by Keating to the hospital and on the way there Keating promised he would take care of the bills. Subsequently Keating repeatedly told plaintiff's mother not to worry - "I will take care of everything." He also promised Dr. Ryan to pay the doctor and hospital bills "if they were reasonable."

Defendant Franzen testified that he had known Keating for 15 years; that he was on duty in the tavern on the night in question; that it was Saturday night, their busy time; he did not remember seeing any of the young men, although they could have been there, and also he did not recall Keating being in the tavern.

Keating testified that about 11 p. m. on this evening he parked his car outside of the tavern and went to the door and "yelled" to Franzen, inquiring whether he had seen a certain friend there; that Franzen was looking right at him at the time. Franzen, however, testified that he did not recall this incident. A Mr. and Mrs. Kaufman, who keep a drug store at 225 W. Garfield boulevard, testified that Keating was in their drug store that night; that he was sober and they did not smell any liquor on him. They also testified that they were following Keating's car just before the accident and that Keating did not stop at Wentworth, and they did not know there was an accident. Their testimony was in conflict with that of Keating, who said he stopped at Wentworth avenue and after the accident went south on the same street. There were other items of evidence which tended to support plaintiff's claim that Keating was intoxicated at the time of the accident by liquor given to him and purchased by him at the tavern owned and operated by Kennedy and Franzen.

This is one of the cases where the credibility of the various witnesses was peculiarly for the jury to determine, together with the weight of the evidence. Upon the issues of the liability of Keating and of the defendants under the Dram Shop

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Defendant Trnren testified that he had known Keating for 15 years; that he was on duty in the tavern on the night in question; that it was Saturday night, their busy time; he did not remember seeing any of the young men, although they could have been there, and also he did not recall Keating being in the tavern.

Keating testified that about 11 p. m. on this evening he parked his car outside of the tavern and went to the door and "yelled" to Trnren, inquiring whether he had seen a certain friend there; that Trnren was looking right at him at the time. Trnren, however, testified that he did not recall this incident. A Mr. and Mrs. Kaufman, who keep a drug store at 225 W. Garfield boulevard, testified that Keating was in their drug store that night; that he was sober and they did not recall any liquor on him. They also testified that they were following Keating's car just before the accident and that Keating did not stop at Wentworth, and they did not know there was an accident. Their testimony was in conflict with that of Keating, who said he stopped

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This is one of the cases where the credibility of the various witnesses was peculiarly for the jury to determine, together with the weight of the evidence. Upon the issue of the liability of Keating and of the defendants under the Dram Shop

act, we cannot say that the conclusion of the jury is contrary to the manifest weight of the evidence.

Defendant's counsel argue earnestly that plaintiff was not seriously injured, and that the verdict is excessive. Dr. Ryan, who first examined plaintiff, found bruises on her body and swelling and pain over the lower part of her spine. X-rays were taken the next morning which showed a complete fracture of the left transverse process of the third lumbar vertebrae, with some displacement; also an impingment of nerves. Her back was bandaged and she was given daily diathermy treatments; she remained in the hospital from December 17, 1938 until January 10, 1939; various casts were applied in an attempt to immobilize the injured parts. She testified that during all of this time she suffered severe pain in her back. Treatments were given to stimulate the uniting of the bones at the place of the injury and these treatments were continued after she was brought to her home. March 10, 1939 she had an appendectomy operation and the removal of an ovarian cyst, but there is no claim that this operation had any connection with the accident.

She was discharged from the hospital March 21 and continued to go to Dr. Ryan's office to receive treatments for the injury to her back 2 or 3 times a week until June 19, 1939, when the doctor ceased to attend her. She testified she still suffered from pain at the time of the trial - April 7, 1941. Counsel for defendants make a savage attack on Dr. Ryan, involving not only his ability, but his character. This was wholly uncalled for. The jury, seeing and hearing the plaintiff and Dr. Ryan testify, can better judge of their credibility than can a court of review, and the amount of damages awarded will not be disturbed unless it is clearly excessive, indicating passion or prejudice on the part of the jury. Metz v. Yellow Cab Co., 248 Ill. App. 609.

The brief in behalf of the defendants complains of many

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She was discharged from the hospital March 11 and continued to go to Dr. Ryan's office to receive treatments for the injury to her back 2 or 3 times a week until June 13, 1939, when the doctor ceased to attend her. She testified she still suffers from pain at the time of the trial - April 7, 1941. Counsel for defendant made a savage attack on Dr. Ryan, involving not only his ability, but his character. This was wholly unwarranted for, the jury, seeing and hearing the Plaintiff and Dr. Ryan testify, can better judge of their credibility than can a court of review, and the amount of damages awarded will not be disturbed unless it is clearly excessive, indicating passion or prejudice on the part of the jury. Matt v. Yellow Dog Co., 220 Ill. App. 2d.

The Court in behalf of the defendant complains of error

things, especially of alleged error in the exclusion and admission of testimony.

In the original complaint filed by plaintiff the ad damnum was placed at \$5,000 in each of the three counts; during the trial she filed an amended complaint in which she asked damages of \$15,000; defendant attempted to offer in evidence the original complaint, arguing that by claiming damages for \$5,000, plaintiff admitted her injuries were slight and that this was inconsistent with the later testimony of plaintiff as to her pain and suffering. The original complaint was not admissible. It was filed within a short time after the date of the accident when she was still under the care of the doctor. She could not then foretell the permanency of her injuries. Neither did she then know the amount of her medical bills. Whether a prior pleading is admissible depends on the facts. (Bennett v. Auditorium Building Corporation, 299 Ill. App. 139.) It is a common practice in cases of this kind for the ad damnum to be increased to correspond with the proof. This does not change the theory of liability and it is no concern of the jury.

Defendants offered the hospital records pertaining solely to plaintiff's operation for appendicitis. Plaintiff admitted this had no connection with the accident. The records of this were not material to any of the issues in the case. They were properly excluded.

Dr. Ryan's testimony concerning Keating's promise to pay plaintiff's medical bills was proper, and the denunciation by counsel for defendants of this testimony as "a brazen, reprehensible attempt to manufacture evidence" was not justified. Moreover, other witnesses testified to similar statements made by Keating without objection.

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tion of the witness Mildred Larson, whom Keating had asked to go with him to plaintiff's home to tell her mother about the accident. The point of the objection seems to be that on her direct examination she was not asked concerning any conversation between her and Keating, but simply what he and she did during the time they were together. On direct examination she described in great detail the movements of Keating, Connolly and herself after the accident, when they called on plaintiff's mother. She was asked if she talked with Mrs. Regan at this time, to which she answered in the affirmative, and the clear implication is that this conversation was in the presence of Keating. It was therefore proper to permit her on cross-examination to testify to the substance of this conversation. People v. Nakutin, 364 Ill. 563, 571. Counsel for defendants in his opening statement to the jury charged that plaintiff's case was fabricated - "a fixed case;" that plaintiff was not hit by Keating's car. Under such circumstances the court properly allowed any testimony tending to throw light on these charges. In Dauids v. The People, 192 Ill. 176, such cross-examination was held to be proper, and in Chicago City Ry. Co. v. Greech, 207 Ill. 400, it was held the scope of cross-examination was largely within the discretion of the trial court and that it was "erroneous for the trial court to restrict the cross-examination to the extent of preventing the party from going only into the matters connected with the examination in chief..." In the instant case the trial court, having in mind the charges of fraud and perjury made against plaintiff and the witnesses on her behalf, had a right to adopt a liberal attitude in order to search for the truth, and any declarations of Keating characterizing his acts was admissible on cross-examination. Other objections are made to the admission and exclusion of evidence which require no comment. We find nothing in this respect which would justify reversal.

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At the request of plaintiff the court gave an instruction to the jury which sets out the words of the Dram Shop statute, under which the suit was brought against Franzen and Kinberg. We have held that such an instruction is proper. Wiedow v. Carpenter, 310 Ill. App. 342; Reisch v. The People, 229 Ill. 574. While the instruction contains the provision for exemplary damages, this would not mislead the jury, for at plaintiff's request the jury were properly instructed on damages, limiting these to the actual damages sustained. No other damages were mentioned in the complaint, evidence, argument or instructions. Cases cited in defendants' brief on this point are not applicable.

Three forms of verdict were tendered to the jury. In the first of these the jury might find all three defendants not guilty; in the second form they might find Keating guilty and Franzen and Kinberg not guilty, and by the third form the jury might find all three defendants guilty. The jury returned the third form of verdict. There is no point in the criticism that from the special malice finding against Keating, Franzen and Kinberg might also be held guilty of malicious conduct, for they were not charged with malice.

The conduct of defendants' attorney during the trial was so irritating and frequently offensive that the trial court found him guilty of contempt. The briefs filed here for defendants do not commend themselves to this court. They contain much abuse of plaintiff, the witnesses on her behalf, her counsel and the Judge, and exhibit temper which has no place in the presentation of points on appeal.

The case was fairly tried and no errors of sufficient importance to require reversal occurred. The evidence was manifestly with the plaintiff, and the jury returned the only verdict they could reasonably give. For the reasons indicated the judgment will be affirmed.

At the request of plaintiff the court gave an instruction to the jury which sets out the words of the Dean Shop statute, under which the suit was brought against Frenzen and Kindberg. We have held that such an instruction is proper. Widow v. Gentry, 310 Ill. App. 342; Reich v. The People, 299 Ill. 574. While the instruction contains the provision for exemplary damages, this would not mislead the jury, for at plaintiff's request the jury were properly instructed on damages, limiting these to the actual damages sustained. No other damages were mentioned in the complaint, evidence, argument or instructions. Cases cited in defendants' brief on this point are not applicable.

Three forms of verdict were tendered to the jury. In the first of these the jury might find all three defendants not guilty; in the second form they might find Keating guilty and Frenzen and Kindberg not guilty, and by the third form the jury might find all three defendants guilty. The jury returned the third form of verdict. There is no point in the criticism that from the special verdict finding against Keating, Frenzen and Kindberg might also be held guilty of malicious conduct, for they were not charged with malice.

The conduct of defendants' attorney during the trial was so irritating and frequently offensive that the trial court found him guilty of contempt. The briefs filed here for defendants do not contain themselves to this court. They contain much abuse of plaintiff, the witnesses on her behalf, her counsel and the judge, and exhibit temper which has no place in the presentation of points on appeal.

The case was fairly tried and no errors of sufficient importance to require reversal occurred. The evidence was submitted with the plaintiff, and the jury returned the only verdict they could reasonably give. For the reasons indicated

While the case was pending in this court and a short record filed, appealing defendants Franzen and Kinberg suggested the death of defendant Francis Keating as having occurred October 28, 1941. Under these circumstances the judgment will be affirmed and entered nunc pro tunc as of October 25, 1941. Citizens Sec. & Inv. Co. v. Dennis, 236 Ill. App. 307.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

While the case was pending in this court and a short record filed, appealing defendants Franzen and Kinberg answered the death of defendant Francis Keating as having occurred October 28, 1941. Under these circumstances the judgment will be affirmed and entered quod pro tunc as of October 28, 1941. Citizens Ins. & Inv. Co. v. Dennis, 238 Ill. App. 307.

VERIFIED.

Matchett and O'Connor, Jr., counsel.

42006

MORTICIANS' ACCEPTANCE CO., INC.,
a corporation,

Appellee,

v.

INTERMENT INSURANCE ASSOCIATION,
a corporation,

Appellant.

) APPEAL FROM

) MUNICIPAL COURT

) OF CHICAGO.

) 315 I.A. 130²

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit as assignee of a policy alleged to have been issued by defendant, and upon trial by the court had judgment for \$300, from which defendant appeals.

The policy is dated May 26, 1937 and covers the life of Sam DeMaria, Jr., an infant; upon his death the proceeds were to be paid to his father, Sam DeMaria, Sr. The insured was killed in an accident on September 3, 1937. The funeral expenses were paid in full.

Plaintiff's evidence tends to show that L. B. McBride, an employe of plaintiff, on September 3rd in response to a call, went to the office of Salerno & Sons, undertakers, and, accompanied by Mr. Salerno, went to the home of Sam DeMaria; McBride examined the policy in question and obtained information as to the payment of premiums, and other data relating to the policy; he noted that the insurance premiums had been paid to November 26, 1937.

On the same day, September 3, Samuel DeMaria assigned to Salerno & Sons all his right and interest in the proceeds of the policy, and on the next day Salerno & Sons, for \$279 paid them, assigned to plaintiff all their right and interest.

Defendant argues that it has not been shown that any application was made to defendant for the policy. The evidence does not support this contention. The application for the policy was produced at the trial by defendant, pursuant to a notice by

had judgment for \$300, from which defendant appeals. to have been issued by defendant, and upon trial by the court Plaintiff brought suit as evidence of a policy alleged

28, 1937.

he noted that the insurance premiums had been paid to November the payment of premiums, and other data relating to the policy; examined the policy in question and obtained information as to paraded by Mr. Salerno, went to the home of Sam Levine; no ride went to the office of Salerno & Sons, undertakers, and, accom- an employee of Plaintiff, on September 23rd in response to a call Plaintiff's evidence tends to show that L. B. Corbridge,

was produced at the trial by defendant, pursuant to a notice by does not run out this contention. The application for the policy application was made to defendant for the policy. The evidence defendant argues that it has not been shown that any

plaintiff to produce it. It is on a printed form of defendant, with what appears to be the signature of Sam DeMaria as applicant; also, the name of defendant's agent, acknowledging receipt of 50 cents on account of premium. It also contains the names and addresses of three friends, and a notation that the certificate was issued to the insured May 26, 1937, on the basis of the questions and answers written in the application. This was signed by "Ida B. Wade, Certificate Clerk."

Beginning with a letter dated September 4, 1937 defendant was notified by plaintiff of the assignment of the policy to it. Some four or five letters followed from plaintiff to defendant to the same effect. December 3 defendant's president replied to plaintiff's attorney, advising that defendant had not yet received proof of death on the policy, and enclosed a form for this purpose to be executed and returned to defendant. December 27 plaintiff sent to defendant a photostatic copy of the coroner's certificate of death, together with claimant's statement. No reply to this last letter seems to have been made by defendant and no claim was made that the policy had not been issued by defendant. It was not until suit was brought that defendant on November 3, 1938 denied by its answer the policy of insurance sued on was ever issued.

Defendant suggests that the evidence fails to show that the premiums were paid up to the time of the insured's death. McBride testified that he examined the premium receipts, which showed that the premiums were paid up to November 26, 1937, and there was no evidence to the contrary. In Globe Mut. Life Ins. Assn. v. Meyer, 118 Ill. App. 155, it was held that delivery of the policy to the insured is prima facie evidence that the premiums have been paid, and even were this not so, delivery of the policy was a waiver of payments in advance.

plaintiff to produce it. It is on a printed form of defendant, with what appears to be the signature of some person as agent; also, the name of defendant's agent, acknowledging receipt of 50 cents on account of premium. It also contains the names and addresses of three friends, and a notation that the certificate was issued to the insured May 16, 1937, on the basis of the questions and answers written in the application. This was signed by "Ida E. Wade, Certificate Clerk."

Beginning with a letter dated September 4, 1937 defendant was notified by plaintiff of the assignment of the policy to it. Some four or five letters followed from plaintiff to defendant to the same effect. December 3 defendant's president replied to plaintiff's attorney, advising that defendant had not yet received proof of death on the policy, and enclosed a form for this purpose to be executed and returned to defendant. December 27 plaintiff sent to defendant a photostatic copy of the coroner's certificate of death, together with claimant's statement. No reply to this last letter seems to have been made by defendant and no claim was made that the policy had not been issued by defendant. It was not until suit was brought that defendant on November 3, 1938 denied by its answer the policy of insurance issued on was ever issued.

Defendant suggests that the evidence fails to show that the premiums were paid up to the time of the insured's death. Herbig testified that he examined the premium receipt, which showed that the premiums were paid up to November 16, 1937, and there was no evidence to the contrary. In State Ins. Life Ins. Assn. v. May, 118 Ill. App. 125, it was held that delivery of the policy to the insured is prima facie evidence that the premiums have been paid, and even where this not so, delivery of the policy was a waiver of payments in advance.

Defendant argues that the court improperly excluded the affidavit of Adeline DeMaria, the wife of Sam DeMaria. The affidavit purported to give conversations between Corrizzo and herself. Defendant's offer to prove by her that Corrizzo, as the agent of the defendant, was, together with Mr. and Mrs. DeMaria, guilty of certain alleged fraudulent acts, was properly excluded, as plaintiff, relying upon possession of the policy by Sam DeMaria, and the premium receipts, paid the undertaker to whom Sam DeMaria, the beneficiary, had assigned it, almost the face value of the policy for the assignment. Plaintiff was entirely innocent with reference to any transaction between defendant's agent and Sam DeMaria, the beneficiary in the policy, and if they were guilty of any fraud the penalty for this should not be imposed upon the plaintiff, an innocent party, but upon whoever put it in the power of the wrongdoer to commit a fraud. Bartlett v. First National Bank, 247 Ill. 490, 498.

Whatever conflict there was in the testimony of any of the witnesses was considered by the trial court, who had the opportunity to pass upon their credibility, and its judgment will not be disturbed. There was no material defense offered, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Defendant argues that the court improperly excluded the affidavit of Adeline Demaria, the wife of Sam Demaria. The affidavit purported to give conversations between Demaria and her self. Defendant's offer to prove by her that Demaria, as the agent of the defendant, was, together with Mr. and Mrs. Demaria, guilty of certain alleged fraudulent acts, was properly excluded as plaintiff, relying upon possession of the policy by Sam Demaria, and the premium receipts, paid the undersigned to whom Sam Demaria, the beneficiary, had assigned it, about the face value of the policy for the assignment. Plaintiff was entirely innocent with reference to any transaction between defendant's agent and Sam Demaria, the beneficiary in the policy, and if they were guilty of any fraud the penalty for this should not be imposed upon the plaintiff, an innocent party, but upon whoever put it in the power of the wrongdoer to commit a fraud. Barlett v. First National Bank, 247 Ill. 490, 498.

Whatever conflict there was in the testimony of any of the witnesses was considered by the trial court, who had the opportunity to pass upon their credibility, and its judgment will not be disturbed. There was no material defense offered, and the judgment is affirmed.

ALFRED

Metcheff and O'Connor, JJ., concur.

42036

NICHOLAS Z. KONSTANT,
Appellee,

v.

GUST MAGGOS,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

96
123

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

315 I.A. 131

Plaintiff sought to establish a mechanic's lien on a vacant lot in Chicago belonging to defendant; the master upheld the claim and, objections and exceptions to his report having been overruled, the chancellor entered a decree granting plaintiff his lien for \$2,249.99, with interest, and defendant appeals.

Defendant on February 20, 1938 was the owner of a restaurant building located near the Cook County Hospital in Chicago; the county filed a condemnation suit against this property, and defendant, with his brother Nick Maggos who assisted in the operation of the restaurant, thought they would be forced to vacate, and had in mind to erect a restaurant on a vacant lot near by at Wood and Polk streets belonging to defendant. Various conversations and negotiations were had with plaintiff, a structural engineer, with reference to the construction of the proposed building. In the latter part of December 1939 the condemnation suit was dismissed and it was unnecessary for defendant to move, and the project of building a new restaurant on the Wood street property was abandoned.

There is much variance in the testimony of plaintiff on the one hand and that of the defendant and his brother. Plaintiff testified that he drew various plans and specifications, including plans for equipment.

Among other defenses defendant says that plaintiff's claim for lien includes many items which are not lienable, such as plans for fixtures which could be removed to other buildings, and defendant cites cases holding that where there is one contract

NICHOLAS E. KONSTANT,)
 Appellee,)
 v.)
 GUST NAGGO,)
 Appellant.)

MR. PRESIDING JUDGE MCWHIRY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to establish a mechanic's lien on a vacant lot in Chicago belonging to defendant; the master upheld the claim and, objections and exceptions to his report having been overruled, the chancellor entered a decree granting plaintiff his lien for \$2,449.99, with interest, and defendant appeals. Defendant on February 29, 1938 was the owner of a restaurant building located near the Cook County Hospital in Chicago; the county filed a condemnation suit against this property, and defendant, with his brother Nick Naggo who resided in the operation of the restaurant, thought they would be forced to vacate and had in mind to erect a restaurant on a vacant lot near by at Wood and Polk streets belonging to defendant. Various conversations and negotiations were had with plaintiff, a structural engineer, with reference to the construction of the proposed building. In the latter part of December 1938 the condemnation suit was dismissed and it was unnecessary for defendant to move, and the project of building a new restaurant on the Wood street property was abandoned.

There is much variance in the testimony of plaintiff on the one hand and that of the defendant and his brother. Plaintiff testified that he drew various plans and specifications, including plans for equipment.

Among other defenses defendant says that plaintiff's claim for lien includes many items which are not liensable, such as plans for fixtures which could be removed to other buildings,

for all the work, a part of which only is lienable and it cannot be determined what part of the contract price is for non-lienable items, the lien cannot be enforced for any part of the work done. Love, Illinois Mechanics' Liens, par. 51 BB, page 114; Cronin v. Tatge, 281 Ill. 336, 339, and other cases. There is merit in this defense, but we prefer to base our decision upon the fact that under the zoning ordinance of the city no restaurant building could be constructed upon the property upon which plaintiff claims a lien.

In the recent case of Wolthausen v. Lederer, 313 Ill. App. (abst.) 143, we went into similar facts somewhat extensively and held that no mechanic's lien could be had which contemplated the erection of a structure in violation of a city ordinance. In that case it was proposed to change a single family dwelling into a two-family dwelling, which would violate the zoning ordinance. We cited Bairstow v. Northwestern University, 287 Ill. App. 424, and many other cases, holding that under such circumstances lien claims will not be sustained. To the same effect is Fisher v. U. S. F. & G. Co., 313 Ill. App. 66.

In the present case plaintiff testified he knew about the zoning restrictions and made an application before the Board of Appeals of Chicago to vary these, but the application was refused. He also said he did not intend to go ahead and supervise the building if the variation of the building ordinance was not forthcoming pursuant to his application.

On the hearing before the master Felix Sychowski, a zoning plan commissioner, testified that he refused to allow an application for a certificate of occupancy for the reason that the proposed improvement upon the lot in question called for a structure covering 100 per cent of the lot, which was in violation of the building line in a resident district. The master was re-

for all the work, a part of which only is liable and it cannot be determined what part of the contract price is for non-liable items, the lien cannot be enforced for any part of the work done. Love, Illinois Mechanics' Liens, par. 51, page 114; Brongia v. Tabor, 281 Ill. 336, 339, and other cases. There is merit in this defense, but we prefer to base our decision upon the fact that under the zoning ordinance of the city no restaurant building could be constructed upon the property upon which plaintiff claims a lien.

In the recent case of Wolthausen v. Leisner, 313 Ill. App. (2d), 148, we went into similar facts somewhat extensively and held that no mechanic's lien could be had which contemplated the erection of a structure in violation of a city ordinance. In that case it was proposed to change a single family dwelling into a two-family dwelling, which would violate the zoning ordinance. We cited Leisner v. Northwestern University, 287 Ill. App. 434, and many other cases, holding that under such circumstances lien claims will not be sustained. To the same effect is Leisner v. U. S. F. & G. Co., 313 Ill. App. 66.

In the present case plaintiff testified he knew about the zoning restrictions and made an application before the Board of Appeals of Chicago to vary these, but the application was refused. He also said he did not intend to go ahead and super-erect the building if the violation of the building ordinance was not forthcoming pursuant to his application.

On the hearing before the master in equity, a zoning plan commissioner, testified that he refused to allow an application for a certificate of occupancy for the reason that the proposed improvement upon the lot in question called for a structure covering 100 per cent of the lot, which was in violation of the building line in a residential district. The master was re-

quested to take judicial notice of the zoning ordinance which prohibited the construction of a restaurant upon this lot. Objections were made by plaintiff to this evidence on the ground that any reference to the zoning ordinance was immaterial and irrelevant. The evidence was heard subject to the objections. In his report the master held that all the testimony with reference to the zoning had been disregarded as immaterial, irrelevant and incompetent with reference to the matters in issue.

Subsequently defendant asked the chancellor for leave to amend his answer by asserting that the building proposed violated the city ordinances. This motion was denied by the chancellor. This was error. Section 46 of the civil practice act (Ch. 110, par. 170, sub-par 3, Ill. Rev. Stats. 1939) provides that "A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon such terms as to costs and continuance as may be just." In Jackson v. Jackson, 294 Ill. App. 552, 561, it was held that the refusal to grant such an amendment was an abuse of the trial court's discretion. And § 92 of the civil practice act gives this court the right to exercise all or any of the powers of amendment of the trial court.

We are not holding that plaintiff might not bring a suit at law to recover compensation for services rendered, but for the reason that the evidence showed the building could not have been erected on the lot in question according to the plans drawn by plaintiff, because of the prohibition of the city ordinance against this type of building on this lot, we hold that plaintiff is not entitled to a mechanic's lien.

The decree of the Circuit court is reversed and the cause is remanded with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, J., concurs.

Matchett, J., dissents.

requested to take judicial notice of the zoning ordinance which prohibited the construction of a restaurant upon this lot. Objections were made by plaintiff to this evidence on the ground that any reference to the zoning ordinance was immaterial and irrelevant. The evidence was heard subject to the objections. In his report the master held that all the testimony with reference to the zoning had been disregarded as immaterial, irrelevant and inconsistent with reference to the matters in issue.

Subsequently defendant asked the chancellor to leave to amend his answer by asserting that the building proposed violated the city ordinance. This motion was denied by the chancellor. This was error. Section 43 of the civil practice act (Ch. 110, par. 170, sub-par. 3, Ill. Rev. Stat. 1929) provides that "A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon such terms as to costs and continuance as may be just." In Jackson v. Jackson, 294 Ill. App. 582, 581, it was held that the refusal to grant such an amendment was an abuse of the trial court's discretion. And § 43 of the civil practice act gives this court the right to exercise all or any of the powers of amendment of the trial court.

We are not holding that plaintiff should not bring a suit at law to recover compensation for services rendered, but for the reason that the evidence showed the building could not have been erected on the lot in question according to the plans drawn by plaintiff, because of the prohibition of the city ordinance against this type of building on this lot, we held that plaintiff is not entitled to a mandamus writ. The decree of the circuit court is reversed and the case is remanded with directions to dismiss the complaint.

REVEREND AND HONORABLE WITH DIRECTIONS.

O'Connor, J., concurring.
Macintosh, J., dissenting.

41981

H. D. CANTIN,
Appellant,

v.

JOSEPH L. ARONSON, also known as
Joseph L. Arenson,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

315 I.A. 131

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 29, 1940, plaintiff caused judgment by confession to be entered against defendant for the sum of \$1,521.04, on twenty-six promissory notes for \$50 each, made July 1, 1939, payable to bearer with interest at 5%. The notes matured serially and monthly.

Defendant filed his petition to have the judgment opened up. This was granted and an order entered that defendant have leave to defend, the judgment in the meantime to stand as security. There was trial by the court with finding for defendant with judgment, and plaintiff appeals.

It appears from the pleadings and facts stipulated that defendant purchased from Benjamin Sapoznik the leasehold and furniture of the Park Plaza Hotel on Cottage Grove Avenue for the sum of \$3,750. He paid \$2,000 in cash and gave his thirty-five notes, payable to bearer, for the sum of \$50 each, dated July 1, 1939. In consideration for the cash and notes Sapoznik executed an assignment of the leasehold and a bill of sale of the furniture of the hotel with an affidavit of compliance with the Bulk Sales Law. The transaction was manifested by a written agreement, executed June 20, 1939, between Sapoznik and defendant Aronson, in which Lester Felsen was named escrowee. The agreement provided that the lease and assignment of it should be deposited with Felsen, and in case of default by defendant Aronson in paying the notes the escrowee should deliver the lease and the assignment to the grantor, Sapoznik; that the grantee should in that

H. D. CANTIN,

Appellant,

APPEAL FROM

CRIMINAL COURT

OF CHICAGO,

JOSEPH L. ARONSON, also known as

Joseph L. Aronson,

Appellee.

MR. JUSTICE LATENT DELIVERED THE OPINION OF THE COURT.

July 29, 1940, plaintiff caused judgment by confession to be entered against defendant for the sum of \$1,521.04, on twenty-six promissory notes for \$50 each, made July 1, 1939, payable to bearer with interest at 5%. The notes matured semi-monthly and monthly.

Defendant filed his petition to have the judgment opened up. This was granted and an order entered that defendant have leave to defend, the judgment in the meantime to stand as security. There was trial by the court with finding for defendant with judgment, and plaintiff appeals.

It appears from the pleadings and facts stipulated that defendant purchased from Benjamin Sapoznik the leasehold and furniture of the Park Plaza Hotel on Cottage Grove Avenue for the sum of \$5,750. He paid \$2,000 in cash and gave his thirty-five notes, payable to bearer, for the sum of \$30 each, dated July 1, 1939. In consideration for the cash and notes Sapoznik executed an assignment of the leasehold and a bill of sale of the furniture of the hotel with an affidavit of compliance with the Bulk Sales Law. The transaction was witnessed by a written agreement, executed June 20, 1939, between Sapoznik and defendant Aronson, in which Lester Telsen was named as witness. The agreement provided that the lease and assignment of it should be deposited with Telsen, and in case of default by defendant Aronson in paying the notes the escrowee should deliver the lease and the assign-

case have immediate possession and the escrowee be released from liability, "and all moneys paid by the grantee shall be retained by grantor as liquidated damages for the use of said premises". This agreement is dated June 20, 1939.

On the reverse side of it is an assignment of the contract to plaintiff, H. D. Cantin, signed by Benjamin A. Sapoznik. It appears from the stipulation and the pleadings that the notes were transferred and the assignment of the contract made to plaintiff on August 8, 1939. On that date plaintiff issued a check to Sapoznik for \$300, which was endorsed by him under the notation: "Payment on purchase of \$1300.00 notes signed by Aronson balance \$450.00". On August 15, 1939, plaintiff issued another check to Sapoznik, endorsed by him under a notation: "Total balance of purchase price on Thirteen Hundred Dollar notes on 3321-29 S. Cottage Grove Avenue".

The stipulation shows that in the latter part of July Sapoznik offered to sell plaintiff twenty-six of the thirty-five notes; that plaintiff, with one Schnitz, met defendant Aronson at 3321 Cottage Grove Avenue, and that plaintiff told Aronson that he had an opportunity to purchase the \$1300 of his notes for \$1,000 and inquired whether the notes were good. Defendant told plaintiff that the notes were good; that if he had the money he would buy the notes himself, and thereupon the notes were purchased on August 8, 1939. At the time plaintiff purchased the notes he issued his check for \$300 to Sapoznik, and on August 15, 1939, another check, which are endorsed as heretofore stated. Defendant remained on the premises until October 1st.

Plaintiff's suit was brought upon the theory that he was an innocent purchaser of the notes in good faith, for value, before maturity and without notice. We think this is not true. On the contrary we agree with the trial judge that he purchased

cases have immediate possession and the answerer be released from liability, "and all moneys paid by the grantor shall be retained by grantor as liquidated damages for the use of said premises".

This agreement is dated June 20, 1937.

On the reverse side of it is an assignment of the contract to plaintiff, H. B. Gantlin, signed by Benjamin A. Sapoznik. It

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tiff on August 8, 1938. On that date plaintiff issued a check

to Sapoznik for \$300, which was endorsed by him under the note-

tion: "Payment on purchase of \$300.00 notes signed by A. Sapoznik"

balance \$450.00". On August 15, 1938, plaintiff issued another

check to Sapoznik, endorsed by him under a notation: "Total

balance of purchase price on Thirteen Hundred dollar note on

3321 Cottage Grove Avenue".

The stipulation shows that in the latter part of July

Sapoznik offered to sell plaintiff twenty-six of the thirty-five

notes; that plaintiff, with one Schmitt, and defendant Johnson at

3321 Cottage Grove Avenue, and that plaintiff told Johnson that

he had an opportunity to purchase the \$300 of his note for

\$1,000 and inquired whether the notes were good. Defendant told

plaintiff that the notes were good; that if he had the money he

would buy the notes himself, and thereupon the notes were pur-

chased on August 8, 1938. At the time plaintiff purchased the

notes he issued his check for \$300 to Sapoznik, and on August 15,

1938, another check, which was endorsed as heretofore stated.

Defendant remained on the premises until October 1st.

Plaintiff's suit was brought upon the theory that he was

an innocent purchaser of the notes in good faith, for value,

before maturity and without notice. He thinks this is not true.

with knowledge and by accepting an assignment of the contract stands precisely in the shoes of Sapoznik, who was his office associate. Indeed, in his answer to the petition to vacate plaintiff does not deny such knowledge. Default having been made in the payments represented by the notes, plaintiff's remedy is limited by the provisions of the contract to forfeiture of payments made as liquidated damages, the return of the bill of sale of the furniture, and the assignment of the leasehold interest. He can not take these back and also collect the notes.

The judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

with knowledge and by accepting an assignment of the contract stands precisely in the shoes of Groganik, who was his office associate. Indeed, in his answer to the petition to vacate plaintiff does not deny such knowledge. Default having been made in the payments represented by the notes, plaintiff's remedy is limited by the provisions of the contract to forfeiture of payments made as liquidated damages, the return of the bill of sale of the furniture, and the assignment of the leasehold interest. He can not take these back and also collect the notes. The judgment will be affirmed.

APPROVED.

McGuire, P. J., and O'Connor, J., concur.

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91

41981

H. D. CANTIN,
Appellant,

v.

JOSEPH L. ARONSON, also known as
Joseph L. Arenson,
Appellee.

)
)
) APPEAL FROM
)
) MUNICIPAL COURT
)
) OF CHICAGO.
)

ADDITIONAL OPINION ON REHEARING.

The plaintiff states that his failure to file a reply brief has led the court to reach a conclusion which otherwise would not have been reached, that the court has held the plaintiff did not purchase the notes as a bona fide holder for value before maturity, and that this holding is erroneous because the stipulation of facts shows plaintiff inquired of defendant before plaintiff purchased the notes whether they were good and was told that they were. We did not overlook that fact. Our conclusion that the plaintiff was not a bona fide holder for value without notice is based upon the undisputed fact that at a later time, when he purchased the notes, he took with them an assignment of the contract upon which they were given, which expressly stated that if default was made in the payment of the notes the money paid would be held as liquidated damages by Sapoznik and the papers turned over by the escrowee to Sapoznik, the fact of which would render the unpaid notes unenforceable in the hands of anyone having knowledge. The plaintiff having taken an assignment of that agreement at the time he bought the notes cannot be heard to say that he did not have such knowledge.

H. D. GALTIN,
Appellant,
v.
JOSEPH L. ARONSON, also known as
Joseph L. Aronson,
Appellee.
MUNICIPAL COURT
OF CHICAGO.

ADDITIONAL OPINION ON REMITTANCE.

The plaintiff states that his failure to file a reply brief has led the court to reach a conclusion which otherwise would not have been reached, that the court has held the plaintiff did not purchase the notes as a bona fide holder for value before maturity, and that this holding is erroneous because the statement of facts shows plaintiff induced of defendant before plaintiff purchased the notes whether they were good and was told that they were. We did not overlook that fact. Our conclusion that the plaintiff was not a bona fide holder for value without notice is based upon the undisputed fact that at a later time, when he purchased the notes, he took with them an assignment of the contract upon which they were given, which expressly stated that if default was made in the payment of the notes the money paid would be held as liquidated damages by Sapoznik and the papers turned over by the sacrowee to Sapoznik, the fact of which would render the unpaid notes unenforceable in the hands of anyone having knowledge. The plaintiff having taken an assignment of that agreement at the time he bought the notes cannot be heard to say that he did not have such knowledge.

42015

ELIZABETH WINTERS,
Appellee,

v.

GRAY LINE SIGHT SEEING COMPANY OF CHICAGO,
a corporation, CHICAGO MOTOR COACH COMPANY,
a corporation, and MARTIN EVERT,
Appellants.

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APPEAL FROM
CIRCUIT COURT,
COOK COUNTY. 125

315 I.A. 132

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Mayd M. Bradley

Plaintiff was a passenger on a bus of the Chicago Motor Coach Company, chartered by the Gray Lines, and was returning from a picnic at Bangs Lake near Wauconda in Lake County, about 10:30 P.M. on June 4, 1938. The bus was going south on the west side of the road; Martin Evert, the driver. The road was U. S. Highway No. 12. About four miles east of Wauconda, Illinois, the bus collided with a Ford automobile which was going north on the east side of the road, driven by Jeff Hinze. This suit was filed March 21, 1939. The evidence is conflicting as to who was at fault. That for plaintiff tended to show that the bus got over on the wrong side of the road; that for defendant that the Ford suddenly turned in front of the bus. The drivers and occupants of the two vehicles, patrolmen who were at the scene of the accident a few minutes after it occurred, gave their testimony. The verdict is for the plaintiff on this issue. Defendant is entitled, however, to the judgment of this court as to whether the verdict in that regard is manifestly against the evidence. Slack v. Harris, 200 Ill. 96, 113; Norkevich, admx. v. Atchison, Topeka and Santa Fe Railway Co., 263 Ill. App. 1, 6. We have carefully considered the evidence of those who testified and the facts and circumstances disclosed by the evidence. We cannot say on this question of liability that the verdict is manifestly against the weight of the evidence.

Defendant requested the court to give an instruction to

ELIZABETH WINTERS, Appellee,
v.
GRAY LINE SIGHT SEEING COMPANY OF CHICAGO, a corporation,
CHICAGO MOTOR COACH COMPANY, a corporation,
and MARTIN EVERT, Appellants.

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APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff was a passenger on a bus of the Chicago Motor Coach Company, chartered by the Gray Lines, and was returning from a picnic at Bangs Lake near Wauconda in Lake County, about 10:30 P.M. on June 4, 1932. The bus was going north on the west side of the road; Martin Evert, the driver. The road was U. S. Highway No. 12. About four miles east of Wauconda, Illinois, the bus collided with a Ford automobile which was going north on the east side of the road, driven by Jeff Hixner. This suit was filed March 21, 1933. The evidence is conflicting as to who was at fault. That for plaintiff tended to show that the bus got over on the wrong side of the road; that for defendant that the Ford suddenly turned in front of the bus. The drivers and occupants of the two vehicles, patrolmen who were at the scene of the accident a few minutes after it occurred, gave their testimony. The verdict is for the plaintiff on this issue. Defendant is entitled, however, to the judgment of the court as to whether the verdict in that regard is manifestly against the evidence. Black v. Harris, 200 Ill. 98, 113; Korovinich v. Atchafon, 206 Ill. 401, 403. The court has carefully considered the evidence of those who testified and the facts and circumstances disclosed by the evidence. We cannot say on this question of liability that the verdict is manifestly against the weight of the evidence.

Defendant requested the court to give an instruction to

the effect that defendant was obligated only to use ordinary care on the theory that defendant was a private rather than common carrier at the time of the accident. No such issue was presented by the pleadings. The uncontradicted evidence was to the effect that defendant was a common carrier, and the cases cited by the defendant to this point are not pertinent. It was not error to refuse the instruction, Parmalee v. McNulty, 19 Ill. 556.

The matter which gives us concern is the amount of the judgment. It is for \$20,000.00. Plaintiff did not testify. Her claim for damages is based on the theory she received a physical injury at the time of the accident which brought about a mental psychosis. She was not present at the trial. There is no claim the psychosis resulted in legal incapacity. The suit is in her own name, without guardian or next friend. If she was competent to testify, more than any other she would know the facts of which the court should have been informed. Her absence from the trial is significant. Belding v. Belding, 358 Ill. 216, 220; Page v. Reeves, 362 Ill. 64, 73. It is well to recall the material facts of her life established by the evidence. At the time of the trial she was 57 years of age. She had been married; bore one child (a daughter) who died at the age of four years. Her husband was killed while serving in the Army; shot while in camp by another soldier. She had (just when does not appear) an unfortunate love affair. The preponderance of the evidence is that from the time she was 13 years of age she continuously suffered from severe migraine headaches. Long prior to the time of this accident she was subject to periods of mental depression, and at one time attempted suicide.

March 30, 1931, plaintiff attended the clinics of the University of Chicago; was referred to Dr. Davis, an obstetrician

the effect that defendant was obligated only to use ordinary care on the theory that a carrier was a private rather than a common carrier at the time of the accident. No such issue was presented by the evidence. The undisputed evidence was to the effect that defendant was a common carrier, and the cases cited by the defendant to this point are not pertinent. It was not error to refuse the instruction. Farmer v. County, 10 Ill. 556.

The matter which gives us concern is the amount of the judgment. It is for \$20,000.00. Plaintiff did not testify. Her claim for damages is based on the theory she received a physical injury at the time of the accident which brought about a mental psychosis. She was not present at the trial. There is no claim the psychosis resulted in legal insanity. The suit is in her own name, without guardian or next friend. If she was competent to testify, none other would know the facts of which the court should have been informed. Her absence from the trial is significant. Belmont v. Belmont, 388 Ill. 215, 220; Page v. Neaves, 382 Ill. 64, 77. It is well to recall the material facts of her life established by the evidence. At the time of the trial she was 37 years of age. She had been married; bore one child (a daughter) who died at the age of four years. Her husband was killed while serving in the army; not while in army by another soldier. She had (just then does not appear) an unfortunate love affair. The predominant theme of the evidence is that from the time she was 15 years of age she continuously suffered from severe depressive psychosis. Long prior to the time of this accident she was subject to periods of mental depression, and at one time attempted suicide.

March 24, 1911. Plaintiff viewed the clinic of the University of Chicago; was referred to Dr. Smith, an obstetrician

and gynecologist, by the department of neurology. Dr. Davis says her difficulty was largely concerned with the pelvic organs. Examination disclosed large tumors, fibroid tumors on the uterus, bleeding on the abdomen, an inflammatory condition of both tubes and ovaries. He recommended an operation. Laboratory tests were taken. The Wassermann and Kahn blood tests were given. The first test came back a Wassermann two plus, positive. The Kahn test also was positive. Three months later the Wassermann test came back strongly positive; the Kahn test positive only one plus. Later tests were negative. An operation was performed. The greater portion of the uterus was removed; also both tubes and both ovaries. She made an uneventful recovery. When plaintiff entered the clinics she complained of headaches since puberty, pain, bleeding and pain in the back of her legs, which had become progressively worse for two years before she entered the clinics. She had nausea occasionally with the headaches. She complained of pains in the joints and tenderness along the vertebral column, blurred vision, some spots before her eyes but no diplopia. Dr. Davis says the results of the operation were excellent, but she was not completely cured. She complained of arthritis and pain in the joints. He recommended complete examinations from time to time.

In December, 1935, plaintiff obtained a position with the Chicago Federated Advertising Club. Charles Southward was executive secretary and her immediate superior. She had worked for the Club prior to the time he worked for it but on a part time basis. She became a full time employee, doing stenographic and cashier work - in fact, Southward's secretary. Her hours were from 9:00 A. M. to 5:00 P. M.; often she worked longer. She was paid \$120.00 a month. Indirectly she supervised other employees in stenographic work. Before the accident, Southward says she

and gynecologist, by the department of neurology, Dr. Davis says her difficulty was largely concerned with the pelvic organs.

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She had nausea occasionally with the headaches. She complained of pains in the joints and tenderness along the vertebral column. Dr. Davis says the results of the operation were excellent, but she was not completely cured. She complained of arthritis and pain in the joints. He recommended complete examination from time to time.

In December, 1935, Plaintiff obtained a position with the Chicago Federated Advertising Club. Charles Southern was executive secretary and her immediate superior. She had worked for the Club prior to the time he worked for it but on a part time basis. She became a full time employee, doing stenographic and cashier work - in fact, Southern's secretary. Her hours were from 9:00 A. M. to 5:00 P. M.; often she worked longer. She was paid \$10.00 a month. Indirectly she supervised other employees

worked steadily every day. A few days after the accident of June 4, 1938, she returned to work and was employed by the company until March or April of 1939, when she was discharged by Southward. From Christmas, 1938, until the time of her discharge, Southward says he had some differences with her; up to the time of the accident she performed her work efficiently. Just why she was discharged is not clear from the evidence. Southward says that something about opening the mails "blew the thing up". He adds, "I don't think there was any change in her personality at the time her employment was terminated as compared to what it had been the year before".

After the accident and prior to her discharge, on September 24, 1938, she became a patient of Dr. Carolyn N. MacDonald. Dr. MacDonald testified she made a complete physical examination. She found the patient had "a hypertension and a few blood cells in her urine". She had severe headaches and was given sedatives and endocrines. When plaintiff came to see the doctor she seemed fairly stable mentally and emotionally and called at the doctor's office every two or three weeks. About the first of the next year the doctor noticed her patient was becoming more unstable, was worrying, seemed to have fixed ideas, was argumentative and worried for fear she would lose her job. After the turn of the year she became worse. The headaches became better in March, were very light. She complained she could not sleep. The doctor tried to persuade her she would be all right, but the patient was sure she would not. She questioned the doctor's word, became much worse and "very annoying". June 30, she was taken to the hospital, was unable to sleep or take care of herself, threatened to jump out of the window. The doctor called a psychiatrist, who suggested the patient be sent to her people. Plaintiff told Dr. MacDonald she had been hurt in an accident, but the doctor asked for no more details. Plaintiff said that prior to the accident

worked steadily every day. A few days after the accident of June 4, 1938, she returned to work and was employed by the company until March or April of 1939, when she was discharged by contract. From Christmas, 1938, until the time of her discharge, Southward says he had some differences with her; up to the time of the accident she performed her work efficiently. Just why she was discharged is not clear from the evidence. Southward says that something about opening the mill "blew the thing up." He adds, "I don't think there was any change in her personality at the time her employment was terminated as compared to what it had been the year before."

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she had felt all right.

Plaintiff went to Bourbon, Indiana, which was her home, where lived two sisters and a niece. She stayed part of the time with one, part of the time with the other. There she became the patient of Dr. C. R. Graham, who suggested she consult Dr. Harshman of Fort Wayne. She did so and was examined by him October 27, 1939. She was brought to his office by her sister, Mrs. Mabel Senour, of Bourbon. Dr. Harshman learned that plaintiff had lost her job in May, since which she had felt indifferent. She, however, insisted she ought to be permitted to go back to Chicago and go to work; her relatives were not well, and she felt that her staying with them caused distress. She also complained of headaches. Dr. Harshman's examination, he says, revealed what he called a "mental blocking", much indecision, extreme tension which increased when he told her he would talk to her sister alone. Dr. Harshman suggested to Dr. Graham a fixed program for the patient each day with definite periods of rest, definite tasks to do and definite periods for appearing at his office. He suggested bromides and "photodyn". The patient did not improve, and at the suggestion of her physician was placed in a Cincinnati sanitarium conducted by Drs. Wright and Johnston.

Plaintiff entered the sanitarium December 2, 1939. She was agitated, apprehensive and fearful; had abrasions on her hands; was picking and biting her nails; was very unresponsive; appeared very ill and depressed and mentally confused. She began to show suicidal tendencies; refused to eat; had to be tube fed. She refused medication and foods. Precautions were taken against suicide. Dr. Wright diagnosed her condition as "manic depressive psychosis", which, he says, was not the result of trauma. Indeed, in February, shock treatment was recommended and a treatment technically known as "metrazol" given. She immediately improved, was cooperative, and after the second or third week would smile

she had felt all right.

Plaintiff went to London, Indiana, which was her home, where lived two sisters and a niece. He stayed part of the time with one, part of the time with the other. There she became the patient of Dr. G. F. Graham, who suggested she consult Dr. Harshman of Fort Wayne. She did so and was examined by him October 27, 1939. She was brought to his office by her sister, Mrs. Habel Benson, of Bourbon, Dr. Harshman learned that Plaintiff had lost her job in May, since which she had felt indifferent. She, however, insisted she ought to be permitted to go back to Chicago and go to work; her relatives were not well, and she felt that her staying with them caused distress. She also complained of headaches. Dr. Harshman's examination, he says, revealed what he called a "mental blocking", much indignation, extreme tension which increased when he told her he would talk to her sister alone. Dr. Harshman suggested to Dr. Graham a fixed program for the patient each day with definite periods of rest, definite tasks to do and definite periods for sleeping at his office. He suggested promises and "photodys". The patient did not improve, and at the suggestion of her physician was placed in a Cincinnati sanitarium conducted by Mrs. Wright and Johnston. Plaintiff entered the sanitarium December 1, 1939. She was agitated, apprehensive and fearful; had abrasions on her hands; was picking and biting her nails; was very unresponsive; appeared very ill and depressed and mentally confused. She began to show suicidal tendencies; refused to eat; had to be tube fed. She refused medication and food. Prescriptions were taken against suicide. Dr. Wright diagnosed her condition as "acute depressive psychosis", which, he says, was not the result of trauma. Indeed, in February, shock treatment was recommended and a treatment technically known as "actazol" given. She immediately improved,

and was able to take occupational therapy and do some crochet work. Something like eight shock treatments were administered, then discontinued. She slipped back a little. They were again given - six or seven more, and she finally settled down to what was considered her normal mental status. On June 9, 1940, she was discharged as recovered.

Dr. Clarence A. Neymann at the request of plaintiff's attorney examined her February 21, 1941. He made a physical, neurological and mental examination; talked to her over an hour about her mental condition. He says she had exaggerated knee jerks and ankle jerks and a blood pressure of 160/90. Her pulse was 86. She was restive; told him her attorney had lied to her. He examined her as to memory; says there was nothing definitely wrong with it; that she could calculate, could apply judgment and reaction to her environment; she knew the environment she was in and the purpose of coming to him. She was peculiar emotionally. At first she refused to be examined. At one point she wrung her hands without reason, and asked why she did it she said it was just a habit. The doctor would not say that she was demented or psychotic. He was sure she was peculiar---bizarre in her actions. In response to a hypothetical question in the usual form, Dr. Neymann said that the condition of her ill-being might or could have resulted from the accident, and that in his opinion her condition was permanent.

Dr. Kushner, who attended her the day after the injury and upon whose advice at that time she went to the hospital where X-rays were taken of her neck, testified that his diagnosis was "that she sustained a cerebral concussion at the time of the accident and a strain of her cervical spine". On the other hand, Dr. Wright, Dr. Johnston and Dr. Eric Oldberg testified in substance that there was no relationship between the illness of which

and was able to take occupational therapy and do some crocheted work. Something like eight shock treatments were administered, then discontinued. She slipped back a little. They were again given - six or seven more, and she finally settled down to what was considered her normal mental status. On June 6, 1940, she was discharged as recovered.

Dr. Clarence A. Neymann at the request of plaintiff's attorney examined her February 21, 1941. He made a physical, neurological and mental examination; talked to her over an hour about her mental condition. He says she had exaggerated knee jerks and ankle jerks and a blood pressure of 180/90. Her pulse was 86. She was restive; told him her attorney had lied to her. He examined her as to memory; says there was nothing definitely wrong with it; that she could calculate, could apply judgment and reaction to her environment; she knew the environment she was in and the purpose of coming to him. She was peculiar emotion-ally. At first she refused to be examined. At one point she wrung her hands without reason, and asked why she did it she said it was just a habit. The doctor would not say that she was depressed or psychotic. He was sure she was peculiar---disorder in her actions. In response to a hypothetical question in the usual form, Dr. Neymann said that the condition of her ill-being might or could have resulted from the accident, and that in his opinion her condition was permanent.

Dr. Kuehner, who attended her the day after the injury and upon whose advice at that time she went to the hospital where X-rays were taken of her neck, testified that his diagnosis was "that she sustained a cerebral concussion at the time of the accident and a strain of her cervical spine". On the other hand, Dr. Wright, Dr. Johnston and Dr. Eric Oldberg testified in substance that there was no relationship between the illness of which

she complained and the alleged accident. The X-ray taken when plaintiff was in the American Hospital immediately after the accident was not produced, and Dr. Kushner gives no facts which would tend to justify the diagnosis he made.

The evidence is to the effect that at the time of the accident the bus was going at a speed of about 25, the Ford automobile at a speed of about 35 miles per hour. The wife of the driver of the automobile was killed and the driver rendered unconscious. The lady with whom plaintiff lived sat in the seat in the bus with her at that time. Plaintiff was thrown forward, her neck striking the seat in front of her. The seat in which they sat was near the middle of the bus. Plaintiff did not become unconscious at the time of the collision. Plaintiff and the lady with whom she roomed took an automobile home together from the scene of the accident. This witness was with plaintiff from the time of the accident until she went to bed. She positively says plaintiff was not unconscious but complained of a pain in her throat.

The case was one which would naturally arouse the sympathies of the jury, but it is difficult to account for the amount of this verdict. Defendant complains that the argument of plaintiff's attorney to the jury was not based on facts in evidence. It is pointed out that he repeatedly stated plaintiff had been rendered unconscious at the time of the accident, and that the injury she there sustained brought about the mental condition which resulted in her clash with her employer and discharge by him months afterward. There is no evidence in the record which would justify these statements. It is in particular objected that defendant's attorney charged that attorney for plaintiff had insisted that plaintiff was infected with syphilis. An examination of the record discloses that this claim is not justified. On the contrary defendant's attorneys were evidently careful not

she complained and the alleged accident. The jury taken when plaintiff was in the American hospital immediately after the accident was not produced, and Dr. Kushner gives no facts which would tend to justify the diagnosis he made.

The evidence is to the effect that at the time of the accident the bus was going at a speed of about 35, the Ford automobile at a speed of about 35 miles per hour. The wife of the driver of the automobile was killed and the driver rendered unconscious. The lady with whom plaintiff lived sat in the seat in the bus with her at that time. Plaintiff was thrown forward, her neck striking the seat in front of her. The seat in which they sat was near the middle of the bus. Plaintiff did not become unconscious at the time of the collision. Plaintiff and the lady with whom she roomed took an automobile home together from the scene of the accident. This witness was with plaintiff from the time of the accident until she went to bed. She positively says plaintiff was not unconscious but complained of a pain in her throat.

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to make any such charge. Zeal for a client is to be commended in lawyers, but justice is the end desired in proceedings before a court. After careful consideration of the evidence, we think (whatever the cause) the verdict of the jury in this case (as to the amount of damages) discloses passion and prejudice and compels another trial. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

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the amount of damages) discloses passion and prejudice and compels
another trial. The judgment will be reversed and the cause re-
manded.

REVEREND AND BELIEVED,

McGraw, P. J., and O'Connor, J., concur.

42022

DOROTHY MOLL,
Appellee,

v.

ALIDA E. MENKER, et al.,
Defendants.

93
176
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Appeal of VERNON F. BLOOM, individually
and as Executor of the Estate of
ALIDA E. MENKER,
Appellant.

315 I.A. 133'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Bloom personally and as executor of Alida E. Menker, deceased, from a decree for plaintiff on a creditor's bill finding certain real estate held in the name of Alida E. Menker to be in fact the property of her husband, Paul Menker, and subject to execution on a judgment obtained against him.

Plaintiff recovered the judgment against Paul Menker in an action of tort July 27, 1922, for \$1,000 and costs, and revived it by scire facias October 27, 1931. Execution issued against the debtor both before and after the revival of the judgment, was personally served on the debtor and returned unsatisfied.

The complaint was filed January 3, 1932; the decree entered June 25, 1941. The cause was heard on exceptions of plaintiff to the report of the master recommending the suit be dismissed. The exceptions were sustained and a decree entered as prayed by plaintiff, directing a sale of the real estate involved for the satisfaction of the judgment subject to redemption.

The original defendants were Paul Menker, the judgment debtor, Chicago Title & Trust Company, as Trustee holding the title to the real estate, Alida E. Hannan Menker, wife of Paul Menker, and William Weller, the tenant of a garage situated on a part of the premises. December 23, 1937, pending this suit, Paul

DOROTHY MOIL,
Appellee,

v.

ALIDA E. MENKER, et al.,
Defendants.APPEAL FROM
CIT COURT,
COK COUNTY.Appellant,
ALIDA E. MENKER,
and as Executor of the Estate of
Appeal of VERNON F. BLOOM, individually.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Bloom personally and as executor of Alida E. Menker, deceased, from a decree for plaintiff on a creditor's bill finding certain real estate held in the name of Alida E. Menker to be in fact the property of her husband, Paul Menker, and subject to execution on a judgment obtained against him.

Plaintiff recovered the judgment against Paul Menker in an action of tort July 27, 1932, for 1,000 and costs, and revived it by actio facias October 27, 1931. Execution issued against the debtor both before and after the revival of the judgment, was personally served on the debtor and returned unsatisfied. The complaint was filed January 3, 1932; the decree entered June 25, 1941. The cause was heard on exceptions of plaintiff to the report of the master recommending the suit be dismissed. The exceptions were sustained and a decree entered as prayed by plaintiff, directing a sale of the real estate involved for the satisfaction of the judgment subject to redemption. The original defendants were Paul Menker, the judgment debtor, Chicago Title & Trust Company, as Trustee holding the title to the real estate, Alida E. Hannan Menker, wife of Paul Menker, and William Weller, the tenant of a garage situated on a

Menker was adjudged insane by the County Court of Cook County and committed to the Chicago State Hospital for the Insane. He died a resident of Chicago, January 9, 1938. His estate has not been probated. His wife, Alida E. Hannan Menker, died March 2, 1939. Vernon Bloom was appointed executor of her estate by the Probate Court and has been substituted for her in this suit.

The title to the land in controversy was conveyed to the Chicago Title & Trust Company January 10, 1923, by declaration of trust signed by the judgment debtor under seal. The written agreement provides the trust company is to deal with the lands only on the written directions of Paul Menker, or the beneficiary or beneficiaries. The beneficiaries are to have the management and control of the property, renting of it, etc. The agreement recites that the beneficiaries have signed to signify their assent to the terms of the trust. The only one thus signing is Paul Menker. Just after his signature at the end of the document is the question, "May the name of any beneficiary be disclosed to the public?", the answer is, "No".

On January 15, 1929, Paul Menker, by writing, assigned and transferred all right, etc. in and to the premises to Harriet Ludolph, who accepted. Harriet Ludolph likewise sold and assigned to Alida E. Menker, the wife of Paul Menker, July 25, 1929. She also accepted. May 7, 1924, Paul Menker directed that a trust deed for a part of the premises here in question should issue to Margaret Menker. May 29, 1924, he directed a deed for another part to issue to Helen Louise Holmes. November 17, 1927, he directed another similar deed to issue to Victor Bartz and Anna Bartz. These were executed and delivered as directed by Paul Menker. July 16, 1932, Mr. Reinecker, who up to that time had represented Paul Menker as attorney in connection with the trust, notified the Chicago Title & Trust Company that Mr. Menker had turned over all these matters to attorney Frederick C. Jonas,

Menker was adjudged insane by the County Court of Cook County and committed to the Chicago State Hospital for the Insane. He died a resident of Chicago, January 9, 1938. His estate has not been probated. His wife, Alida E. Hannan Menker, died March 1, 1939. Vernon Bloom was appointed executor of her estate by the Probate Court and has been substituted for her in this suit.

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and asked further charges should not be made in connection therewith against him. December 21, 1926, Paul Menker gave notice he desired distress for rent brought against the tenant of the garage, Mr. Larson. July 14, 1927, he gave authority to a real estate company to sign a petition for leave to carry on a gasoline filling station on a part of the premises.

Indeed, without further recitation of specific acts, it may be stated the evidence discloses that in every respect he was in entire control of the premises, the same as if he had been the actual owner.

Mrs. Menker on the trial testified that she never had any knowledge that her deceased husband had at any time any interest in the premises. She said she knew nothing of the transaction between Harriet Ludolph and Paul Menker; that at all times since she became the owner of the premises she received the rents, although at times her husband had collected rents for her, as did her brother. She also testified that she purchased the assignment from Harriet Ludolph before she was married to Paul Menker and paid therefor out of her own funds the sum of \$2,500. This was not true. In attempting to explain where she got the \$2,500, she said she had it in the Englewood State Bank in her own name part in a savings part in a checking account. The records of the First Englewood State Bank were brought into court and disclosed her testimony to be untrue. She at no time had that much money to her credit in that bank.

The trial judge gave a statement of his reasons for sustaining the exceptions to the report of a master, saying in substance that he was loathe to disturb a master's report as to facts found in it, but he was convinced the master erred; that he had read the record and was of the opinion that the assignments were merely colorable and made for the purpose of defrauding Menker's creditors. Menker, the court said, "exercised the same

and asked further charges should not be made in connection therewith with against him. December 11, 1936, Paul Barker gave notice he desired distress for rent brought against the tenant of the garage, Mr. Larson. July 14, 1937, he gave authority to a real estate company to sign a petition for leave to carry on a lease-line filling station on a part of the premises.

Indeed, without further recitation of specific acts, it may be stated the evidence discloses that in every respect he was in entire control of the premises, the same as if he had been the actual owner.

Mrs. Barker on the trial testified that she never had any knowledge that her deceased husband had at any time any interest in the premises. She said she knew nothing of the transaction between Harriet Ludolph and Paul Barker; that at all times since she became the owner of the premises she received the rents, although at times her husband had collected rents for her, and did her brother. She also testified that she purchased the interest from Harriet Ludolph before she was married to Paul Barker and paid therefor out of her own funds the sum of \$5,500. This was not true. In attempting to explain where she got the \$5,500, she said she had it in the Englewood State Bank in her own name part in a savings part in a checking account. The records of the First Englewood State Bank were brought into court and disclosed her testimony to be untrue. She at no time had that much money to her credit in that bank.

The trial judge gave a statement of his reasons for sustaining the exceptions to the report of a master, saying in substance that he was loathe to disturb a master's report so to factor found in it, but he was convinced the master erred; that he had read the record and was of the opinion that the statements were merely colorable and made for the purpose of obtaining

control and operation of the property after the first and second assignments as he did prior thereto".

George Moony, an insurance broker, testified that from 1929 to 1936 he saw Paul Menker at least three times a week; that he had a customer who was interested in buying the garage and was willing to pay \$14,000 or \$15,000 for it; that in his opinion it was worth \$15,000; that he saw Menker collecting the rent from the business there.

Daniel Macek testified he dealt with Paul Menker with reference to renting the garage. Menker brought to him a lease which was made out in the name of Alida Hannan. Macek says that Menker said Alida was his wife and that he had all his property in her name. Macek was a tenant for some time and says he always paid rent to Menker and never to his wife.

Defendant argues admissions of Paul Menker to a third person were not competent against Mrs. Menker to prove her participation in any fraudulent purpose of Paul Menker. She cites Ebers, Receiver, v. Rieckenberg, et al., 213 Ill. App. 454, and other cases, all of which are distinguishable for the reason that at the time of these alleged admissions the evidence shows Paul Menker was in possession of the property and managing it. Jones v. King, 86 Ill. 225, 228; Bump on Fraudulent Conveyances, p. 319.

It is urged that in order to show presumptive fraud it was necessary to prove that Paul Menker rendered himself insolvent by making the assignment in question, and McKenna, et al. v. Mickelberry, et al., 242 Ill. 117, with similar cases are cited. It is true as a general rule that fraud is not presumed and must be established by clear and convincing evidence. The rule, however, is otherwise when a debtor makes a conveyance to a wife, child or other person standing in a similar relationship. Bartel

control and operation of the property after the first and second assignments as he did prior thereto".

George Mooney, an insurance broker, testified that from 1929 to 1930 he saw Paul Menker at least three times a week; that he had a customer who was interested in buying the garage and was willing to pay \$14,000 or \$15,000 for it; that in his opinion it was worth \$18,000; that he saw Menker collecting the rent from the business there.

Daniel Masok testified he dealt with Paul Menker with reference to renting the garage. Menker brought to him a lease which was made out in the name of Miss Hannah. Masok says that Menker said Alida was his wife and that he had all his property in her name. Masok was a tenant for some time and says he always paid rent to Menker and never to his wife.

Defendant argues admissions of Paul Menker to a third

person were not competent against Paul Menker to move her participation in any fraudulent purpose of Paul Menker. She cites Sparks, Executor, v. Michigan Bank, et al., 215 Ill. App. 43, and other cases, all of which are distinguishable for the reason that at the time of these alleged admissions the evidence shows Paul Menker was in possession of the property and managing it. Jones v. King, 85 Ill. 225, 226; Camp on fraudulent conveyances, p. 310.

It is urged that in order to show prospective fraud it was necessary to prove that Paul Menker removed himself insouciant by making the assignment in question, and Michigan Bank, et al., v. Sparks, Executor, et al., 215 Ill. App. 43, with similar cases are cited. It is true as a general rule that fraud is not presumed and must be established by clear and convincing evidence. The rule, however, is otherwise when a debtor makes a conveyance to a wife, child or other person standing in a similar relationship. Daniel

v. Zimmerman, 293 Ill. 154, 162; Torrey v. Dickinson, 213 Ill. 36, 45; Birney v. Solomon, 348 Ill. 410, 414.

It is said the burden is on plaintiff to prove fraud, and it is urged that if Mrs. Menker's designs may be traced to honest equally with corrupt motives, the honest motive is to be imputed by the court. The proposition, as a matter of law, is sound. It is not applicable to the facts here. The decree is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

v. Zimmerman, 303 Ill. 184, 185; Convey v. Nicholson, 313 Ill.

30, 45; Birney v. Solomon, 348 Ill. 410, 414.

It is said the burden is on plaintiff to prove fraud,

and it is urged that if Mrs. Barker's designs may be traced to honest equally with corrupt motives, the honest motive is to be imputed by the court. The proposition, as a matter of law, is sound. It is not applicable to the facts here. The decree is affirmed.

AFFIRMED.

McGuire, P. J., and O'Connor, J., concur.

41945

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN F. SWEENEY,
Appellee,

v.

JAMES P. ALLMAN, Commissioner of
Police of the City of Chicago,
JOSEPH P. GEARY, WENDELL E. GREEN
and JOHN E. BRENNAN, Civil Service
Commissioners of the City of Chi-
cago, and ROBERT B. UPHAM, Comp-
troller of the City of Chicago,
Appellants,

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

94
127
315 I.A. 133²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

John F. Sweeney filed his petition for a writ of mandamus against defendants to compel his restoration to the position as patrolman in the classified civil service of the Police Department of the City. After the issues were made up there was a trial before the court, the writ was awarded and defendants appeal.

The record discloses that John F. Sweeney was certified and appointed patrolman June 7, 1922, and continued in the performance of his duties until he was removed after hearing by the Civil Service Commission April 24, 1940. He was charged with (1) "Conduct unbecoming a police officer or employee of the Police Department;" (2) "Neglect of duty;" and (3) "Inattention to duty." The specifications of the charges filed against him were that on April 8, 1940, he was "guilty of neglect of duty" and "inattentive to duty." The court after hearing the evidence said "He [Sweeney] was working from nine to four without relief. That is their own testimony. On the evidence of the other three officers before the commission it is clear that there wasn't the slightest proof of neglect of duty. Since there was no evidence at all before the commission upon which to make its finding."

The substance of the evidence was that April 8, 1940, Sweeney was detailed to guard a Fannie May Candy store at 3318 Lawrence avenue, where there had been two previous robberies,

PEOPLE OF THE STATE OF ILLINOIS,
 ex rel. JOHN F. SWEENEY,
 Appellee,
 v.
 JAMES P. ALLMAN, Commissioner of
 Police of the City of Chicago,
 JOSEPH P. GARY, WENDALL E. GARY,
 and JOHN E. BERNARD, Civil Service
 Commissioners of the City of Chi-
 cago, and ROBERT H. ULMAN, Com-
 ptroller of the City of Chicago,
 Appellants.

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The record discloses that John F. Sweeney was certified and appointed patrolman June 7, 1932, and continued in the performance of his duties until he was removed after hearing by the Civil Service Commission April 24, 1940. He was charged with (1) "Conduct unbecoming a police officer or employee of the Police Department;" (2) "Neglect of duty;" and (3) "Inattention to duty." The specifications of the charges filed against him were that on April 8, 1940, he was "guilty of neglect of duty" and "inattentive to duty." The court after hearing the evidence said "He [Sweeney] was working from nine to four without relief. That is their own testimony. On the evidence of the other three officers before the commission it is clear that there was at least proof of neglect of duty. Since there was no evidence at all before the commission upon which to make its finding."

The substance of the evidence was that April 8, 1940, Sweeney was detailed to guard a female New Gandy store at 2318

although Sweeney testified on the hearing before the Commission, which evidence is in the record before us, that he did not know at the time of the assignment there had been two holdups of the store within 10 days; that he learned of this fact later; that he was sent to the store to watch for holdups. He was stationed in the back room of the store looking out through a diamond-shaped peep hole about one and one-half inches square and about three to four feet above the floor. About 2:30 p.m. April 8, Sweeney was in the back room of the store and a saleslady who had been working back there went into the front or sales part of the store to wait upon two men who stood at the counter. Plaintiff looked through the peep hole and saw the two men who appeared to be ordinary customers - nothing suspicious about them. He saw no guns, there was no outcry. The janitor who was in the back room of the store, walked across the room to get water; one of the men in the store saw him, whirled around and entered the back room with his gun drawn. Plaintiff reached for his gun which was strapped in front of him in the holster where it was handy but the holdup man ordered him to "take your hand off." Sweeney testified, "I hesitated just a second and saw I didn't have a chance and so I took my hand off and they ordered me to put up my hands and face the wall." The other man said: "Get his gun," which he did. He was then locked with the other persons in the store, in the toilet room. The holdup man then took \$3.35 from the cash register and departed.

In Funkhouser v. Coffin, 221 Ill. App. 14, Funkhouser sought to be restored to the position of second deputy superintendent of police of Chicago, from which he had been removed by the Civil Service Commission, this court ordered that the proceedings before the Civil Service Commission be quashed, and granted a certificate of importance where the judgment of this court was reviewed by the Supreme court and affirmed (301 Ill.257).

although Sweeney testified on the hearing before the Commission, which evidence is in the record before us, that he did not know at the time of the assignment there had been two holdups of the store within 10 days; that he learned of this fact later; that he was sent to the store to watch for holdups. He was stationed

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Plaintiff looked through the peep hole and saw the two men who appeared to be ordinary customers - nothing suspicious about them. He saw no guns, there was no outcry. The janitor who was in the back room of the store, walked across the room to get water; one of the men in the store saw him, whistled around and entered the back room with his gun drawn. Plaintiff reached

for his gun which was strapped in front of him in the holster where it was handy but the holdup man ordered him to "take your hand off." Sweeney testified, "I hesitated just a second and saw I didn't have a chance and so I took my hand off and they ordered me to put up my hands and face the wall." The other man said:

"Get his gun," which he did. He was then looked with the other persons in the store, in the toilet room. The holdup man then

took \$2.35 from the cash register and departed.

In Frankfurter v. Coffin, 211 Ill. App. 1st, 1908.

sought to be restored to the position of second deputy assistant of police of Chicago, from which he had been removed by the Civil Service Commission, this court ordered that the proceedings before the Civil Service Commission be quashed, and granted a certificate of reappointment where the judgment of this

The record of the proceeding before the Civil Service Commission, including the evidence there taken, was before the court and the Supreme court, in passing on the question said, (p. 261): "There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intentment in favor of such jurisdiction but the facts upon which the jurisdiction is founded must appear in the record. Appellee has a right to a judicial review of the proceedings, 'and the record must show that the board acted upon evidence and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order.' (Tazewell Coal Co. v. Industrial Com., 287 Ill. 465; Glos v. Woodard, 202 id. 480.)" And continuing the court said, (p. 263): "The record before us does not disclose in any way any facts constituting a cause for the removal of appellee from his position as a member of the police force of Chicago, and it cannot be told from an inspection of the record that any such facts existed, the only statement in the record being that the evidence was heard and appellee was found guilty as charged. Under all the authorities cited, the words 'as charged' must be held to be a mere conclusion of law and not a recital of the facts. Even though it be conceded that the specifications filed against appellee might constitute legal cause for removal, there is nothing in the return made to this writ from which this court can see that there was any attempt to prove any of the facts or what was the particular state of facts upon which he was found guilty. It is true, as urged by counsel for the civil service commissioners, that the courts have no power to inquire into the discretion exercised by the commission, provided it acted within its power. (People v. City of Chicago, 234 Ill. 416, and authorities there cited.) A very wide latitude is necessarily granted to the commission in the

The record of the proceeding before the Civil Service Commission, including the evidence there taken, was before the court and the Supreme court, in passing on the question said, (p. 281): "There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intentment in favor of such jurisdiction but the facts upon which the jurisdiction is founded must appear in the record. It is the right to a judicial review of the proceedings, and the record must show that the board acted upon evidence and content in testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order." (Exwell Coal Co. v. Industrial Com. 287 Ill. 465; Giles v. Woodard, 202 Ill. 480.) and continuing the court said, (p. 283): "The record before us does not disclose in any way any facts constituting a cause for the removal of appellee from his position as a member of the police force of Chicago, and it cannot be told from an inspection of the record that any such facts existed, the only statement in the record being that the evidence was heard and appellee was found guilty as charged. Under all the authorities cited, the words 'as charged' must be held to be a mere conclusion of law and not a recital of the facts. Even though it be conceded that the specifications filed against appellee might constitute legal cause for removal, there is nothing in the return made to this writ from which this court can see that there was any attempt to prove any of the facts or what was the particular state of facts upon which he was found guilty. It is true, as urged by counsel for the civil service commission, that the courts have no power to inquire into the discretion exercised by the commission, provided it acted within its power. (People v. City of Chicago, 234 Ill. 118, and authorities there cited.) A very

exercise of discretion in matters of this kind, but as the authorities cited hold, 'the inferior tribunals that have power to proceed only when certain jurisdictional facts are established must judge for themselves, according to their best discretion, whether such facts exist. But it does not by any means make their action a case of discretion not to be controlled, *** Their judgment as to what the law has allowed them to determine will be controlled, otherwise they may assume unlimited powers.' (State v. Common Council, 9 Wis. 229.)" The court in that case also said that "if the court finds the inferior body had no jurisdiction or had exceeded it or had not proceeded according to law it will quash the judgment and proceedings" of the Civil Service Commission. See also Murphy v. Houston, 250 Ill. App. 385; Campbell v. Comm., 290 Ill. App. 105.

In the instant case we are of opinion that there was no evidence fairly tending to show that Sweeney was guilty of any wrongdoing and we also are agreed with the trial judge when he said: "there wasn't the slightest proof of neglect of duty."

Counsel for defendants say that "Mandamus does not lie to review the proceedings of the Civil Service Commission" but that certiorari is the proper method, and cite cases which support them. But in People ex rel. Mitchell v. City of Chicago, 243 Ill. App. 100, we considered this question and held, after an analysis of many authorities of this state, that both certiorari and mandamus may be used as remedies to secure the reinstatement of a police officer claimed to have been wrongfully removed by the Civil Service Commission.

In the instant case Sweeney had been a patrolman of the City of Chicago for 18 years and so far as the record discloses, no complaint was ever made that he did not perform his duties efficiently.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

exercise of discretion in matters of this kind, but as the author-
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 proceed only when certain jurisdictional facts are established,
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 In the instant case Sweeney had been a policeman of the
 City of Chicago for 18 years and so far as the record discloses,
 no complaint was ever made that he did not perform his duties
 efficiently.
 The judgment of the Circuit court of Cook county is
 affirmed.

41953

ARMIN F. HILLMER, et al., as
representatives of all creditors
of Chicago Bank of Commerce,
Appellants,

v.

LEOPOLD E. BLOCK, et al.,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

315 I.A. 134

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a representative suit brought by creditors of the Chicago Bank of Commerce against former and final stockholders of the bank to enforce the superadded constitutional liability of the stockholders. On a former appeal we affirmed a decree entered September 17, 1938, against the defendant stockholders involved in the matter now before us. Hillmer v. Chicago Bank of Commerce, 303 Ill. App. 43. The case was then taken to the Supreme court where the judgment of this court was affirmed in part, reversed in part and remanded with directions (375 Ill. 266.) Afterward the case was re-docketed in the trial court and the decree entered in 1938, as to the defendants involved in the case before us, was vacated and set aside and a new decree entered May 22, 1941, for 50% of the amounts rendered against the individual defendants by the decree of 1938. And it was ordered that the appeal bonds filed by such defendants on the former appeal be released and discharged. Afterward, June 11, 1941, on motion of counsel for defendants, an order was entered directing the receiver of the bank to satisfy the decree as to certain defendants who had tendered the amounts decreed to be due from them. It is to reverse this order and the decree of May 22, 1941, that plaintiffs appeal.

The decree of May 22, 1941 provided that the defendants pay to the receiver of the bank the specific amounts mentioned "together with statutory interest from the date hereof to the date

ARMIN F. WILLIAMS, et al.,
representatives of all creditors
of Chicago Bank of Commerce,
Appellants,

v.

LEOPOLD E. BLOCH, et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE CONNOR DELIVERED THE OPINION OF THE COURT.

This is a representative suit brought by creditors of the Chicago Bank of Commerce against former and final stockholders of the bank to enforce the unpaid constitutional liability of the stockholders. On a former appeal we affirmed a decree entered September 17, 1938, against the defendant stockholders involved in the matter now before us. Williams v. Chicago Bank of Commerce, 303 Ill. App. 43. The case was then taken to the Supreme Court where the judgment of this court was affirmed in part, reversed in part and remanded with directions (375 Ill. 288). Afterward the case was re-docketed in the trial court and the decree entered in 1938, as to the defendants involved in the case before us, was vacated and set aside and a new decree entered May 23, 1941, for 50% of the amounts rendered against the individual defendants by the decree of 1938. And it was ordered that the appeal bonds filed by each defendant on the former appeal be released and discharged. Afterward, June 11, 1941, on motion of counsel for defendant, an order was entered directing the receiver of the bank to satisfy the decree as to certain defendants who had tendered the amounts ordered to be due from them. It is to reverse this order and the decree of May 23, 1941, that plaintiff's appeal.

The decree of May 23, 1941 provided that the defendant pay to the receiver of the bank the specific amounts mentioned

of payment." Counsel for plaintiff contend that the amounts found due under this decree should bear interest from the date of the entry of the original decree of September 17, 1938; that the original decree should not have been vacated because defendants before us "were entitled at most to a partial reduction of the decree rendered against them;" that "certain matters of fact were not disposed of in the opinion of the Supreme court;" that plaintiff should have been permitted to introduce proof of those matters; that plaintiff's creditors, by the decree of 1938, acquired liens upon real estate, and that the appeal bonds should not have been released and discharged.

We are unable to agree with any of these contentions. Defendants were contesting the right of plaintiffs to a decree against them and were successful on their appeal to the Supreme court. The several amounts found due from them were not determined until the opinion of the Supreme court was filed and a rehearing denied February 5, 1941. In these circumstances we think it would be inequitable to require defendants to pay interest from 1938. Lewis v. West Side Tr. & Svgs. Bank, 376 Ill. 23 - 46. We are also of opinion that the court followed the opinion of the Supreme court in vacating the decree and discharging the appeal bonds. The procedure would at least be anomalous to permit plaintiffs to appeal from a decree and at the same time have appeal bonds entered into by defendants on a former appeal, held to be in effect. The case was not open for hearing of further evidence. We are further of opinion that what the Supreme Court of the United States said in Stoll v. Gottlieb, 305 U. S. 165, is appropriate here. The court there said: "It is just as important that there should be a place to end as that there should be a place to begin litigation."

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

of payment." Counsel for plaintiff contend that the amounts found due under this decree should bear interest from the date of the entry of the original decree of September 17, 1938; that the original decree should not have been vacated because defendants before us "were entitled at most to a partial reduction of the decree rendered against them;" that "certain matters of fact were not disposed of in the opinion of the Supreme Court;" that plaintiff should have been permitted to introduce proof of those matters; that plaintiff's creditors, by the decree of 1938, acquired liens upon real estate, and that the appeal bonds should not have been released and discharged.

We are unable to agree with any of these contentions. Defendants were contesting the right of plaintiff to a decree against them and were successful on their appeal to the Supreme Court. The several amounts found due from them were not determined until the opinion of the Supreme Court was filed and a rehearing denied February 8, 1941. In these circumstances we think it would be inequitable to require defendants to pay interest from 1938. Lewis v. West Side Tr. & Inv. Bank, 376 Ill. 63 - 46.

We are also of opinion that the court followed the opinion of the Supreme Court in vacating the decree and discharging the appeal bonds. The procedure would at least be anomalous to permit plaintiff to appeal from a decree and at the same time have appeal bonds entered into by defendants on a former appeal, held to be in effect. The case was not open for hearing of further evidence. We are further of opinion that what the Supreme Court of the United States said in Stoll v. Gottlieb, 305 U. S. 165, is appropriate here. The court there said: "It is just as important that there should be a place to end as that there should be a place to begin litigation."

The decree of the Superior Court of Cook County is affirmed.

41978

ELITA E. MALLERS,
Appellee,

v.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
a Corporation,
Appellant.

) APPEAL FROM

) CIRCUIT COURT,

) COOK COUNTY,

) 315 I.A. 135'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, as beneficiary and owner of a life insurance policy issued by defendant insuring the life of her husband for \$25,000, brought an action to recover the face of the policy, less loans made against it and unpaid premiums. The case was submitted to the court on an agreed statement of facts. June 23, 1941, the court entered a summary judgment in plaintiff's favor for \$21,912.50, together with interest thereon from June 7, 1937, at 5% per annum, or a total of \$26,324, and defendant appeals.

The material facts as agreed upon are: that John B. Mallers, November 18, 1926, applied in Chicago to defendant for a policy of insurance. November 29, 1926, the policy was issued in New York and delivered to the insured in Chicago. Mrs. Fred T. Gowland was named as beneficiary. The first premium was paid carrying insurance to February 19, 1927, and thereafter the annual premiums due February 19 were paid to February 19, 1937. May 9, 1927, John B. Mallers delivered to defendant in Chicago an application for the rewriting of the policy so as to designate plaintiff, his wife, as the absolute owner of the policy. The old policy was surrendered and a new one issued which is the basis of this suit. The policy provided: "PROVISIONS RELATING TO LOANS AND SURRENDER VALUES. LOANS. At any time, while this policy is in full force, after three full years' premiums have been paid, the Society will advance to the Owner *** on the sole security hereof a sum which, with interest, shall not exceed the cash value at

11378

ELITA E. MALLERS,
Appellee,

v.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
a Corporation,
Appellant.

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, as beneficiary and owner of a life insurance policy issued by defendant insuring the life of her husband for \$25,000, brought an action to recover the face of the policy, less loans made against it and unpaid premiums. The case was submitted to the court on an agreed statement of facts. June 25, 1941, the court entered a summary judgment in plaintiff's favor for \$21,912.80, together with interest thereon from June 7, 1937, at 5% per annum, on a total of \$26,324, and defendant appeals.

The material facts as agreed upon are: That John B. Mallers, November 18, 1926, applied in Chicago to defendant for a policy of insurance. November 29, 1926, the policy was issued in New York and delivered to the insured in Chicago. Mrs. Fred T. Gowland was named as beneficiary. The first premium was paid carrying insurance to February 19, 1927, and thereafter the annual premiums due February 19 were paid to February 19, 1937. May 5, 1937, John B. Mallers delivered to defendant in Chicago an application for the rewriting of the policy so as to designate plaintiff, his wife, as the absolute owner of the policy. The old policy was surrendered and a new one issued which is the basis of this suit. The policy provided: "PROVISIONS RELATING TO LOANS AND SURRENDER VALUES. LOANS. At any time, while this policy is in full force, after three full years' premiums have been paid, the Society will advance to the owner *** on the sole security hereof

the end of the then current policy year less any indebtedness to the Society *** provided all premiums or instalments of the same have been fully paid to the end of the then current policy year. Interest shall be at the rate of 6% per annum, and shall be payable on the premium anniversary date of this policy. The loan may be increased by the cash value of dividend additions credited to this policy, if any. If the loan is for a purpose other than to pay premiums *** the granting of the same may be deferred *** for a period not exceeding ninety days ***. Failure to repay such loan or to pay interest thereon shall not avoid this policy unless the total indebtedness *** shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the Owner, *** to their addresses last known ***.

"OPTIONS ON SURRENDER OR LAPSE. After three full years' premiums have been paid ***, upon any subsequent default in the payment of any premium or instalment thereof, and within three months after such default, this policy may be surrendered by the Owner *** who may elect one of the following options: (a) To receive the Cash Surrender Value of this policy; or (b) To purchase non-participating paid-up life insurance ***; or (c) To continue the insurance for its face amount (and any outstanding dividend additions) as paid-up extended term insurance ***.

"In the event of default in the payment of any premium or instalment thereof after this policy has been in force three full years, if the Owner *** does not select one of said options within three months of such default, the insurance shall be continued as provided under Option (c).

"If there be any indebtedness against this policy, the cash surrender value shall be reduced thereby, the paid-up insurance shall be reduced proportionately," etc.

the end of the then current policy year less any indebtedness to the Society *** provided all premiums or instalments of the same have been fully paid to the end of the then current policy year. Interest shall be at the rate of 6% per annum, and shall be payable on the premium anniversary date of this policy. The loan may be increased by the cash value of dividend additions credited to this policy, if any. If the loan is for a purpose other than to pay premiums *** the granting of the same may be deferred *** for a period not exceeding ninety days ***. Failure to repay such loan or to pay interest thereon shall not avoid this policy unless the total indebtedness *** shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the Owner, *** to their addressee last known

"OPTIONS ON SURRENDER OR LAPSE. After three full years' premiums have been paid *** upon any subsequent default in the payment of any premium or instalment thereof, and within three months after such default, this policy may be surrendered by the Owner *** who may elect one of the following options: (a) To receive the Cash Surrender Value of this policy; or (b) To purchase non-participating paid-up life insurance ***; or (c) To continue the insurance for its face amount (and any outstanding dividend additions) as paid-up extended term insurance ***.

"In the event of default in the payment of any premium or instalment thereof after this policy has been in force three full years, if the Owner *** does not elect one of said options within three months of such default, the insurance shall be continued as provided under Option (c).

"If there be any indebtedness against this policy, the cash surrender value shall be reduced thereby, the paid-up insurance shall be reduced proportionately," etc.

"REINSTATEMENT. If this policy shall lapse in consequence of the non-payment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Society, and the payment of all overdue premiums, with interest at 5% per annum, and upon the payment with interest or the reinstatement of any indebtedness to the Society secured by this policy."

The agreed facts further show that February 18, 1930, plaintiff signed a printed document prepared by defendant designated, "Special Contract" in which it is recited that defendant had made a "cash advance" to plaintiff upon the security of the policy and "the dividend additions thereto, if any" and that plaintiff assigned to defendant the policy and additional dividends, if any, as security for the repayment of such advance, "and all additional advances" which might thereafter be made upon conditions which were (1) that interest at 6% per annum was payable to defendant on the advances "upon the next premium anniversary date and annually thereafter. Interest if not paid when due shall be added to the existing loan and shall bear interest at the same rate." (2) That unless such advances were "repaid to the Society prior to default in payment of any premium" while the policy is in force, all such "advances and any interest thereon shall become due to the Society:

"(a) When the total of said advances and interest shall equal or exceed the loan value of said policy and of the dividend additions thereto, if any. In that event such loan value shall be applied by the Society in repayment of said advances and interest, and said policy and dividend additions shall be canceled without notice or upon such notice as is stated in said policy.***

"or (b)***

"or (c) Upon default in payment of any premium on said policy. In that event the total of all advances and any interest

"... If this policy shall lapse in consequence of the non-payment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Society, and the payment of all overdue premiums, with interest at 5% per annum, and upon the payment with interest or the reinstatement of any indebtedness to the Society incurred by this policy."

The aforesaid facts further show that February 18, 1930, plaintiff signed a printed document prepared by defendant defendant, "Special Contract" in which it is recited that defendant had made a "cash advance" to plaintiff upon the security of the policy and "the dividend additions thereto, if any" and that plaintiff assigned to defendant the policy and additional dividends, if any, as security for the repayment of such advance, "and all additional advances" which might thereafter be made upon conditions which were (1) that interest at 8% per annum was payable to defendant on the advance "upon the next premium anniversary date and annually thereafter. Interest is not paid when due shall be added to the existing loan and shall bear interest at the same rate." (2) That unless such advance was "repaid to the Society prior to default in payment of any premium" while the policy is in force, all such "advances and any interest thereon shall become due to the Society:

"(a) When the total of said advances and interest shall equal or exceed the loan value of said policy and of the dividend additions thereto, if any. In that event such loan value shall be applied by the Society in payment of said advances and interest, and said policy and dividend additions shall be cancelled without notice or upon such notice as is stated in said policy."

"or (b) ***

"or (c) Upon default in payment of any premium on said

thereon shall not be repayable in cash but shall be deducted by the Society from any sum" that might be due under the policy. By paragraph 3 provision is made for additional advances and by paragraph 7 it is provided: "7. This agreement is made and delivered and the amount of the first advance is paid and received at the Society's Home Office in the City of New York;" that all applications for additional advances should be made and accepted and repayable at the home office in New York "and this agreement is made under and pursuant to the laws of the State of New York and shall be construed in accordance therewith."

Thereafter further advances were made from time to time until they amounted to \$3,087.50, of which \$2,390.81 was applied by defendant in payment of premiums, excluding interest. The annual premiums were paid to February 19, 1937. After that date the time of the payment of the premiums was extended to May 10, 1937. The insured died June 7, 1937. Plaintiff did not within three months after May 10, 1937, or at any time, elect one of the options on surrender or lapse of the policy and no part of the premium due February 19, 1937, or the advances or interest thereon, which were due on that date, have been paid.

Defendant's contention, as stated by its counsel, is: "the Options on Surrender or Lapse could not operate to continue the policy in force after May 10, 1937, because the surrender value of the policy had been entirely exhausted by the loan." That "On May 10, 1937 the indebtedness exceeded the surrender value by \$40.60, the amount of additional interest to that date." On the other hand counsel for plaintiff's position is that "If we compute simple interest on the aggregate of the sums advanced, \$2,390.81 from February 19, 1937 to May 10, 1937" the policy had a value on the latter date of \$57.02, which was more than enough to carry the policy beyond the death of the insured, June 7, 1937.

thereon shall not be repayable in cash but shall be deducted by the Society from any sum" that might be due under the policy. By paragraph 3 provision is made for additional advances and by paragraph 7 it is provided: "7. This agreement is made and delivered and the amount of the first advance is paid and received at the Society's Home Office in the City of New York; that all applications for additional advances should be made and accepted and repayable at the home office in New York" and this agreement is made under and pursuant to the laws of the State of New York and shall be construed in accordance therewith."

Thereafter further advances were made from time to time until they amounted to \$3,087.50, of which \$2,700.81 was applied by defendant in payment of premiums, excluding interest. The annual premiums were paid to February 19, 1937. After that date the time of the payment of the premiums was extended to May 10, 1937. The insured died June 7, 1937. Plaintiff did not within three months after May 10, 1937, or at any time, elect one of the options on surrender or lapse of the policy and no part of the premium due February 19, 1937, or the advance or interest thereon, which were due on that date, have been paid.

Defendant's contention, as stated by its counsel, is: "the Options on Surrender or Lapse could not operate to continue the policy in force after May 10, 1937, because the surrender value of the policy had been entirely exhausted by the loan." That "On May 10, 1937 the indebtedness exceeded the surrender value by \$40.80, the amount of additional interest to that date." On the other hand counsel for Plaintiff's position is that "if we compute simple interest on the aggregate of the sums advanced, \$2,360.81 from February 19, 1937 to May 10, 1937" the policy had a value on the latter date of \$7.02, which was more than enough to carry the policy beyond the death of the insured, June 7, 1937.

Counsel further contend that irrespective of this question, plaintiff's right to recover is sustained by the doctrine announced by our Supreme court in Schmidt v. Equitable Life Assurance Society, 376 Ill. 183.

In reply counsel for defendant contend that the policy in question and the special contract or loan agreement of February 18, 1930, must be determined under the statutes and decisions of New York and not of Illinois; that the policy and the loan agreement must be construed according to the laws of that state and that there was no loan agreement involved in the Schmidt case. And counsel say: "We have seen that the Schmidt case held that the policy loan should be considered repaid out of the face amount of the policy and that the full surrender value of the policy, thus deemed to have been restored, should be considered as having purchased extended term insurance to the date of death," and that this holding was contrary to the law as stated in Lange v. Metropolitan Life Ins. Co., 252 App. Div. 696, (1 N. Y. S. (2d) 821) affirmed 278 N. Y. 626. The New York court in that case held that under a New York statute "the loan must be deducted from the surrender value before such value can be applied to the purchase of extended insurance, rather than deducted from the face amount of the policy." And further, that "the Schmidt case involved no Loan Agreement such as is involved in this case. *** that this is a vital and controlling distinction *** and renders the Schmidt case inapplicable to the issues here, both under Illinois law and under New York law." That the loan agreement prohibits the repayment of the loans by plaintiff; that it provides: "all advances and any interest thereon shall not be repayable in cash but shall be deducted by the Society from any sum *** otherwise applicable to the purchase of paid-up or extended term insurance," that "the Loan Agreement is not on its face in conflict with the policy *** but only an amplification and clarifi-

Counsel further contends that irrespective of this position, plaintiff's right to recover is established by the doctrine announced by our Supreme Court in Schmidt v. Metropolitan Life Insurance Society, 378 Ill. 182.

In reply counsel for defendant contends that the policy in question and the special contract or loan agreement of February 18, 1930, must be determined under the statutes and conditions of New York and not of Illinois; that the policy and the loan agreement must be construed according to the laws of that state and that there was no loan agreement involved in the Schmidt case. And counsel say: "We have seen that the Schmidt case held that the policy loan should be considered paid out of the face amount of the policy and that the full surrender value of the policy, thus deemed to have been restored, should be considered as having purchased extended term insurance to the date of death," and that this holding was contrary to the law as stated in Langbe v. Metropolitan Life Ins. Co., 352 App. Div. 696, (1st Dept. 1931) (2d) 821 affirmed 378 N. Y. 816. The New York Court in that case held that under a New York statute "the loan must be deducted from the surrender value before such value can be applied to the purchase of extended insurance, rather than deducted from the face amount of the policy." And further, that "the Schmidt case involved no loan agreement such as is involved in this case. *** that this is a vital and controlling distinction *** and renders the Schmidt case inapplicable to the issues here, both under Illinois law and under New York law." That the loan agreement prohibits the repayment of the loan by plaintiff; that it provides "all advances and any interest thereon shall not be repayable in cash but shall be deducted by the Society from any sum otherwise applicable to the purchase of paid-up or extended term insurance," that "the loan agreement is not on its face in con-

ation thereof."

If there is no conflict between the provisions of the policy and the loan agreement, as counsel for defendant say, then we are bound by the holding of our Supreme court in the Schmidt case because the provisions of the policy on "Options on Surrender or Lapse" are identical with the policy in the case before us and in that case our Supreme court held that where the insured, in case of default, was given a three months' option to accept cash value, purchase paid-up insurance or continue the policy as paid-up extended term insurance, the term insurance would run from the date of default, but the insurer could not apply this option to defeat the policy prior to the expiration of the period of three months, where the insured died before that period had expired.

In the Schmidt case the court said: "the question is whether two insurance policies on the life of Edward C. Schmidt, appellee's husband, were in effect at the time of his death. Appellee, as beneficiary, brought this suit on the policies in the circuit court of Cook county." That there was judgment in favor of defendant in the trial court, which was reversed by the Appellate court, with directions to enter judgment in favor of plaintiff for the face of the policy less the loans, plus interest from the date of the insured's death. In that case as in this the policy provided: "In the event of default in the payment of any premium or installment thereof after this policy has been in force three full years, if the Insured *** does not select one of said options within three months of such default, the insurance shall be continued as provided under Option (c)." In that case the premiums due August 13, 1932 were not paid, the insured died September 16, 1932 "which was after the expiration of the grace period and within the three-months' option period,"

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action thereof."

If there is no conflict between the provision of the policy and the loan agreement, as counsel for defendant say, then we are bound by the holding of our Supreme court in the Schmidt case because the provisions of the policy on "Options on Surrender or Lapse" are identical with the policy in the case before us and in that case our Supreme court held that where the insured in case of default, was given a three months' option to accept cash value, purchase paid-up insurance or continue the policy as paid-up extended term insurance, the term insurance would run from the date of default, but the insurer could not apply this option to defeat the policy prior to the expiration of the period of three months, where the insured died before that period had expired.

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August 13, 1932, when the premiums were due, after allowing for loans against the policy, there was a surrender value which would purchase extended term insurance for four and a fraction days. Neither the insured nor his beneficiary elected any of the options. The court there said appellee (plaintiff) "claims that where there is a lapse in a policy which has been in force for over three years and there are non-forfeiture provisions like those here involved, the insured, for three months after the date of the lapse, has a right to pay the indebtedness and select the option he desires; and that where death occurs during the three-months' option period, the right of selection inures to the beneficiary, but it is not necessary for the beneficiary to go through the formality of an election or to repay the indebtedness; that instead, the indebtedness can be deducted from the face of the policy, and that appellant had no right to apply the cash value of the policy to purchase extended insurance until the three-months' option period expired." The court then discussed some authorities and continuing said, (p. 189): "Appellant cites a large number of cases from other jurisdictions, which deal with situations where the insured died after the option period expired without having exercised any of the options, or where the provision for extended term or paid-up insurance was expressly provided to be applicable automatically and immediately upon lapse. Obviously, those cases are not controlling or persuasive here. Appellant contends they are based on the fundamental principle that non-forfeiture options are intended to permit the insured, upon lapse of a policy, to either obtain the net value of the policy in cash, or use it as a single premium to purchase extended coverage, and that only so much extended coverage can be allowed as the net value of the policy will pay for. This does not answer appellee's contention that she has

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for August 12, 1932, when the premiums were due, after allowing for loans against the policy, there was a surrender value which would purchase extended term insurance for four and a fraction days. Neither the insured nor his beneficiary elected any of the options. The court there said appellee (plaintiff) "claims that where there is a lapse in a policy which has been in force for over three years and there are non-forfeiture provisions like those here involved, the insured, for three months after the date of the lapse, has a right to pay the indebtedness and select the option he desires; and that where death occurs during the three-months' option period, the right of selection inures to the beneficiary, but it is not necessary for the beneficiary to go through the formality of an election or to repay the indebtedness; that instead, the indebtedness can be deducted from the face of the policy, and that appellant had no right to apply the cash value of the policy to purchase extended insurance until the three-months' option period expired." The court then discussed some authorities and continuing said, (p. 139) : "Appellant cites a large number of cases from other jurisdictions, which deal with situations where the insured died after the option period expired without having exercised any of the options, or where the provision for extended term or paid-up insurance was expressly provided to be applicable automatically and immediately upon lapse. Obviously, those cases are not controlling or persuasive here. Appellant contends they are based on the fundamental principle that non-forfeiture options are intended to permit the insured, upon lapse of a policy, to either obtain the net value of the policy in cash, or use it as a single premium to purchase extended coverage, and that only so much extended coverage can be allowed as the net value of the policy will pay for. This does not answer appellee's contention that the has

the right of election until the end of the option period, and cannot be deprived of it before that time by any act of the insurer. The contention that appellee seeks to have extended coverage allowed, although there were no net values in the policy to pay for it, is without foundation. She makes no such claim. She admits the cash surrender value would purchase extended insurance for only four and a fraction days from the date of the lapse, but she claims that this cannot be done by the company before the option period expires, and that, meanwhile, she has the right to pay the loans, or to have them deducted from the face amount of the policies and that she is entitled to the remainder."

The contention of the appellee in the Schmidt case was sustained and the judgment of the Appellate court affirmed.

We are further of opinion the loan agreement or special contract of February 18, 1930, did not prohibit the repayment of all advances by plaintiff, as defendant contends, but only provided it could not hold plaintiff personally liable for the amount of such advances. The agreement as above quoted, provides that unless the advances are paid prior to default in payment of premium, while the policy is in force, the advances shall become due. And further that in the event of the default in payment of any premium, all advances and interest thereon shall not be repayable in cash but shall be deducted by defendant from the value of the policy. We have above quoted provisions of the policy with reference to loans. It provides that such loans "shall be payable on the premium anniversary date of this policy."

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

The right of election until the end of the option period, and cannot be deprived of it before that time by any act of the insurer. The contention that appellee seeks to have extended coverage allowed, although there were no net values in the policy to pay for it, is without foundation. She seeks to claim, she admits the cash surrender value would purchase extended insurance for only four and a fraction days from the date of the lapse, but she claims that this cannot be done by the company before the option period expires, and that, meanwhile, she has the right to pay the loans, or to have them deducted from the face amount of the policies and that she is entitled to the remainder."

The contention of the appellee in the Schmitt case was sustained and the judgment of the appellate court affirmed. We are further of opinion the loan agreement or special contract of February 18, 1930, did not prohibit the payment of all advances by plaintiff, as defendant contends, but only provided it could not hold plaintiff personally liable for the amount of such advances. The agreement as above quoted, provides that unless the advances are paid prior to default in payment of premium, while the policy is in force, the advances shall become due. And further that in the event of the default in payment of any premium, all advances and interest thereon shall not be repayable in cash but shall be deducted by defendant from the value of the policy. We have above quoted provisions of the policy with reference to loans. It provides that such loans "shall be payable on the premium anniversary date of this policy."

The judgment of the Circuit court of Cook County is affirmed.

41816

P. J. KOHL & CO., INC., a
corporation,
Appellant,

v.

H. J. BLOMGREN, et al.,

LUDWIG SUSSMAN, ROSE WEIMESCHKIRCH
and HAZEN M. PANCOST,
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

315 I.A. 135²

PER CURIAM.

We allowed a petition for rehearing in the above entitled cause, and plaintiff has filed an answer.

After giving further consideration we hold as not applicable decisions in cases where the individuals were acting under a corporate form and in a corporate name, such as Pilsen Brewing Co. v. Wallace, 291 Ill. 59, and other like cases, where it was held that the individuals so acting are liable as partners. In the present case there is no evidence that defendants ever acted under a corporate form and in a corporate name.

We rested our opinion upon the proposition that defendants gave Schoene implied authority to purchase the pass books in question and are estopped from denying liability for the cost of these.

Before plaintiff can claim the benefit of an estoppel there must have been conduct on the part of the defendants calculated to mislead plaintiff, and it must be shown that it relied upon this conduct, and not only must plaintiff have been in ignorance of the true facts but devoid of convenient means of ascertaining the real situation. Tri-City Transp. Co. v. Bituminous Casualty Corp., 311 Ill. App. 610, 616, and cases there cited. In the present case the record fails to show that there was any affirmative conduct or representation on the part of the defendants which mislead the plaintiff, nor does the record show that plaintiff relied or acted upon any conduct of the defendants to its injury.

11111

U. S. District Court
Southern District of New York

U. S. District Court
Southern District of New York

UNITED STATES OF AMERICA
and
JAMES M. HANCOCK
Appellants

THE OPINION.

As allowed a petition for rehearing in the above entitled
case, and plaintiff has filed an answer.

After giving further consideration we hold as not well-
founded in law the individuals were acting under
a corporate form in a corporate name, such as U. S. v. Bell,
U. S. v. Bell, 201 Ill. 52, and other like cases, where it was
held that the individuals were acting as partners. In
the present case there is no evidence that defendants ever acted
under a corporate form and in a corporate name.

We stated our opinion upon the proposition that defendants
gave the same implied authority to purchase the goods in
question and are estopped from denying liability for the same in
these.

Before plaintiff can claim the benefit of an agreement
there must have been conduct on the part of the defendant related
to the claim, and it must be shown that it related
upon this conduct, and not only with plaintiff have been in trans-
action of the true facts but having of agreement of defendant
in the real situation. U. S. v. Bell, 201 Ill. 52, and other like cases.
In the present case the present facts are such that no such relation-
ship conduct or agreement can be shown on the part of the defendant which
related the plaintiff, and thus the present claim that liability
related on facts upon which a contract of relationship to the liability.

We see no reason why plaintiff, before it printed and delivered the pass books in question, should not have made inquiry as to who was to pay for them. As was said, under somewhat similar facts in Mendenhall Co. v. Booher, 48 S. W. (2d) 120, under the rule of caveat emptor it was plaintiff's duty to make such an inquiry. We are not prepared to hold that by the mere application of defendants for permission to organize a bank and by merely subscribing to stock of the proposed bank, they became liable for the preliminary expenses involved.

True these defendants had their places of business nearby the location of the proposed bank. But we know of no rule that would impose liability upon them because of this fact.

For the reason that there was an obligation upon the plaintiff to make inquiry as to who would pay for the goods ordered by Schoene and that no such inquiry was made, and also for the reason that there was no conduct of the defendants upon which plaintiff relied, we hold that plaintiff cannot recover from defendants and that the judgment of the Municipal court should be affirmed.

AFFIRMED.

we see no reason why plaintiff, before it joined and filed
the case books in question, should not have made inquiry as
to who was to pay for them. As was said, under somewhat different
facts in Wentworth v. v. Cooper, 48 N. H. (1862), under
rule of caveat emptor it was plaintiff's duty to make such
inquiry. We are not prepared to hold that by the mere
of defendants for permission to organize a bank and by
expecting to stock of the proposed bank, they became liable
the preliminary expenses involved.

The third defendants and their alleged customers
the location of the proposed bank. But we know of no rule
would impose liability upon them because of this fact.

For the reason that there was no obligation upon
plaintiff to make inquiry as to who would pay for the
by someone and that no such inquiry was made, and also for
reason that there was no conduct of the defendants upon which
plaintiff relied, we hold that plaintiff cannot recover the
ante and that the judgment of the Superior Court should be

affirmed.

362—ILLINOIS APPELLATE

1—313 Ill. App. Part 4—68641 Reynolds 4-8 8 Dev 10x23

67—Case Number

22 Jan 4/9

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P. J. Kohl and Company, Inc., Appellant, v. H. J. Blomgren et al., Appellees.

Gen. No. 41,816. (Abstract of Decision.)

PARTNERSHIP, § 13—*effect of incomplete incorporation.* Where the defendants applied for and obtained permission to organize a state bank and subscribed for stock in the proposed bank but the incorporation was never completed, and there was much publicity put out on the opening of the bank, with a party present in the proposed building appointing the same who gave an order for savings bank books, the latter had implied authority from defendants to equip the bank for banking purposes and the defendants were estopped to say that he did not represent them, and defendants were liable as partners for the bank book order.

Appeal from Municipal Court of Chicago; Hon. MATTHEW D. HARTIGAN, presiding. Judgment reversed and remanded with directions. Heard in first division, first district, this court at October term, 1941; opinion filed March 23, 1942. Baker, Holder & Hagstrom, for appellant; Joseph G. Hagstrom, of counsel; Leslie L. Lyons, for certain appellees; Leslie L. Lyons, of counsel; Kamfner & Halligan, for certain other appellee. Opinion by JUSTICE O'CONNOR. "Not to be published in full."

1940-1941

1940-1941

1940-1941

1940-1941

362—ILLINOIS APPELLATE

1—313 Ill. App. Part 4—68641 Reynolds 4-8 8 Dev 10x23

67—Case Number

Case 4/9

P. J. Kohl and Company, Inc., Appellant, v. H. J. Blomgren et al., Appellees.

Gen. No. 41,816. (Abstract of Decision.)

PARTNERSHIP, § 13 *—*effect of incomplete incorporation.* Where the defendants applied for and obtained permission to organize a state bank and subscribed for stock in the proposed bank but the incorporation was never completed, and there was much publicity put out on the opening of the bank, with a party present in the proposed building appointing the same who gave an order for savings bank books, the latter had implied authority from defendants to equip the bank for banking purposes and the defendants were estopped to say that he did not represent them, and defendants were liable as partners for the bank book order.

Appeal from Municipal Court of Chicago; Hon. MATTHEW D. HARTIGAN, presiding. Judgment reversed and remanded with directions. Heard in first division, first district, this court at October term, 1941; opinion filed March 23, 1942. Baker, Holder & Hagstrom, for appellant; Joseph G. Hagstrom, of counsel; Leslie L. Lyons, for certain appellees; Leslie L. Lyons, of counsel; Kamfner & Halligan, for certain other appellee. Opinion by JUSTICE O'CONNOR. "Not to be published in full."

East New Valley

9 Partnership, § 13 *— effect of incomplete incorporation.

Where the defendants applied for and obtained permission to organize a state bank and subscribed for stock in the proposed bank but the incorporation was never completed, and there was much publicity put out on the opening of the bank, with a party present in the proposed building appointing the same who gave an order for savings bank books, the latter had implied authority from defendants to equip the bank for banking purposes and the defendants were estopped to say that he did not represent them, and ^{defendants} were liable as partners for the bank book order.

Error to Municipal Court of Chicago;
Appeal from Superior Court of Cook County;
Circuit Court of

county:

County Court of

county:

Hon. Matthew D. Hartigan, presiding.

Affirmed Judgment reversed and remanded with directions.

~~Reversed~~
~~Reversed and remanded with directions.~~

Heard in first division, first district,
this court at October term, 1941;

opinion filed March 23, 1942. rehearing denied

Baker, Holder & Hagstrom,
~~Leslie L. Lyons, for certain appellants~~

For appellants;

Joseph G. Hagstrom, of counsel;

for plaintiffs in error;

Leslie L. Lyons, for certain appellees; Leslie L. Lyons, of counsel;

For appellees.

Kamfner & Halligan, for certain appellee. other

for defendants in error.

Opinion by Presiding Justice O'Connor.

"Not to be published in full."



41816

P. J. KOHL & CO., INC., a
corporation,
Appellant,

v.

H. J. BLOMGREN, et al.,

LUDWIG SUSSMAN, ROSE WEIMESCHKIRCH
and HAZEN M. PANCOST,
Appellees.

67
APPEAL FROM

MUNICIPAL COURT,
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover \$1400.40, the amount claimed to be due for savings bank books sold by it to the Rogers Park State Bank which was in the process of being organized, defendants being persons who petitioned the Auditor of Public Accounts for permission to organize the bank under the statute of this state and who became subscribers for stock in the proposed bank. The organization of the proposed bank was never completed. Three of the defendants were served with process; they filed their answer denying liability. Afterward the case was tried before the court without a jury on a stipulation of facts; the court found the issues against plaintiff and it appeals.

The facts in substance are: that plaintiff is an Illinois corporation; that defendant Sussman at the time in question operated a moving picture theatre located at 7074 North Clark street; that defendant Weimeschkirch at that time was engaged in the undertaking business at 7066 North Clark street and that defendant Pancost was an investment manager with his place of business at 7068 North Ashland Boulevard, all in Chicago. Each of the three businesses was in a radius of two city blocks in Chicago from 7001 North Clark street where the proposed bank

ALIAS

P. J. BLOOMER, et al.,
corporation,
appellant,

v.

P. J. BLOOMER, et al.,

LIBERTY BUREAU, NEW YORK
AND WATER G. BUREAU,
appellees.

NO. 12121. DECISION BY THE COURT OF THE STATE.

Plaintiff brought an action against defendant to
recover \$1400.40, the amount claimed to be due for various
books sold by it to the defendant and which was in the
process of being organized, defendant being plaintiff's
auditor of public accounts for purposes of organization
the bank under the statute of this state and who became defendant's
era for stock in the proposed bank. The organization of the
proposed bank was never completed. None of the defendants were
served with process; they filed their answer denying liability.
Afterwards the case was tried before the court without a jury on
a stipulation of facts; the court found the issues against defendant
and it is affirmed.

The facts in substance are: That plaintiff is an
Illinois corporation; that defendant is an Illinois corporation
which operated a moving picture business located at 705 North
Clark street; that defendant was organized at that time and was
located in the building on North Clark street at 705 North Clark street and
that defendant had an investment company in the city of Chicago
of business at 705 North Clark street, all in Chicago.
Each of the three defendants was a partner in the plaintiff
in Chicago from 705 North Clark street until the plaintiff was

was to be located. In fact the places of business of two of the defendants were located across Clark street a short distance from where the Rogers Park Bank, being incorporated, was to conduct its bank.

It further appears from the stipulation that May 25, 1939, the three defendants, with others, applied to the Auditor of Public Accounts for permission to organize a state bank "to be known as the 'Rogers Park State Bank of Chicago,' at 7001 North Clark Street" Chicago, which was to have a capital stock of \$200,000. June 1, 1939, application was filed with the Auditor and on the same day he issued a permit to defendants and others authorizing them to proceed. That afterwards defendants and others subscribed for stock in the proposed bank; that defendants did not secure a charter for the operation of the bank and none has been obtained; that June 1, 1939, and for some time subsequent, defendants knew that premises at 7001 North Clark street were "being established and furnished suitable for banking purposes" and that there were in and about the premises signs, notices and other indicia that the building was to be used and occupied by the Rogers Park State Bank of Chicago as a banking institution; that on the exterior walls and on the windows in large gold-faced letters the name "Rogers Park State Bank" appeared and that Harry H. Schoene was in the premises occupying a desk and there was no other person except a young lady who operated the telephones in the premises; that "Schoene was in charge of the furnished quarters *** for all intents and purposes designed for the use of banking *** and *** was daily engaged in the laying out, furnishing and appointing of the premises *** for the purposes of preparing" them for a bank under the name and description of Rogers Park State Bank of Chicago, and was installing desks and chairs to be used in connection with the

was to be located. In fact the places of burial of the
the defendants were located across the street from the
from where the bodies were found, being investigated, and to
not be done.

It further appears from the investigation that in
1932, the three defendants, who were, applied to the
of Public Accounts for permission to organize a trust fund
be known as the "Hague Trust Fund of Chicago," at 2001
North Dear Street, Chicago, which was to have a capital of
of \$100,000. On June 1, 1932, application was filed with the
and on the same day he issued a permit to defendants and others
authorizing them to proceed. That affidavit was sworn to
others subscribed for stock in the proposed fund; that defendants
did not secure a charter for the operation of the fund and have
has been obtained; that on June 1, 1932, and for some time
quent, defendants have had possession of the fund and have
were "being established and controlled suitable for handling busi-
ness" and that there were in and about the premises
notions and other articles that the building was to be used for
occupied by the Hague Trust Fund of Chicago as a business
institution; that on the evening of June 1, 1932, the fund is
large pile-loads of papers the name "Hague Trust Fund" ap-
peared and that Harry O. Wagner was in the building operating
a desk and there was no other person except a person who was
operated the telephone in the premises; that "defendants and
others of the fund had no right to all papers and documents
belonging to the use of the fund" and that the only papers
in the paper box, including and relating to the fund, were
for the purpose of providing that for a long period of time
and destruction of papers with the use of the fund, and was
installing desks and chairs to be used in connection with the

bank. June 8, 1939, the Rogers Park State Bank, by Schoene, gave an order to plaintiff for the savings bank books and June 29 they were delivered to Schoene at 7001 North Clark Street.

It is further stipulated defendants did not have any knowledge that the order had been placed with plaintiff for the books or that they had been delivered. That the books "constituted equipment necessary for the operation of any banking business." That the incorporation was never completed and the bank never opened for business. That there appeared in the "Howard News" (a newspaper of general circulation in the community of the proposed bank) for a period of several weeks, advertisements which are in the record, showing a picture of the building. Notices appeared in the windows of the building, in one of which it was stated: "You are invited to visit ... Your NEW BANK at Clark and Lunt" (7001 North Clark Street) naming the chairman, president, vice-president and cashier, and assistant cashier. The name of Pancost, one of the defendants, appears as vice-president. It was further stated in this document that the bank would formally open Saturday, July 1st, at 9 A. M.; that the bank was to be "Under the direction of veteran bankers, and warmly supported by prominent residents and business firms of the North Side, the Rogers Park State Bank will be operated on sound banking principles, tested by time. *** It will be a pleasure to meet you in this beautiful bank, at our Formal Opening, this Saturday."

Counsel for defendants in their brief, in support of the judgment say: "In the absence of a clear showing that the defendants actively participated in the particular transaction between Schoene and the plaintiff, or that the defendants expressly or impliedly authorized Schoene to incur debts on their behalf, they

bank, June 2, 1930, the papers and books were, as before, given
an order to plaintiff for the papers and books and how to
they were delivered to defendant at 7001 North Clark Street.
It is further stipulated that defendant is not aware of
knowledge that the order had been placed with plaintiff for the
books or that they had been delivered. That the books were deli-
tuted equipment necessary for the operation of my building bank.
near. That the inspection was never completed and the books
never opened for inspection. That there appeared in the "Chicago
News" (a newspaper of general circulation in the community of
the proposed bank) for a period of several weeks, advertisements
which are in the record, showing a picture of the building.
Notice appeared in the window of the building, in one of which
it was stated: "You are invited to visit... I am now open at
Clark and Lunt" (7001 North Clark Street) naming the defendant,
president, vice-president and cashier, and secretary general.
The name of the bank, one of the defendants, appears in the adver-
dant. It was further stated in this document that the bank was
formally open Saturday, July 1st, at 2 P. M.; that the bank was
to be "under the direction of various officers, and under my
control by permanent residents and business firms of the bank
side, the future bank will be located on South Dear-
ing principles, tested by time. It will be a pleasure to
meet you in this beautiful room, at our formal opening, Wed-
nesday."

Consent for defendant in their name, in support of the
judgment say: "In the absence of a direct showing that the defen-
ants actively participated in the fraudulent conversion between
defendant and the plaintiff, it is the defendant's responsibility to
indirectly authorize defendant to issue orders to their bank, they

cannot be held individually liable to the plaintiff for the indebtedness incurred," and cite a number of cases. We think this is a correct statement of one legal principle applicable to the facts in the case, and since it does not appear from the record that defendants did actively participate in the purchase of the books, the question for decision is, did they by their conduct, impliedly authorize Schoene to incur the indebtedness, as a result of which, they would be estopped to deny that Schoene acted as their agent? In support of their contention counsel cite, among other cases, Mendenhall Co. v. Booher, 48 S. W. 2d. 120 (226 Mo. App. 945) which they say "is precisely in point with the case at bar."

In that case an attempt was made to organize the Triangle Drug Club but there was a failure to file the articles of association in the office of the Secretary of State. In the meantime, the Triangle Drug Club engaged in the business specified in the articles of agreement and had a store-room located in Kansas City, Missouri. Dixon, who was named in the articles as one of the incorporators and also as secretary, was in charge and control of the place of business. He ordered merchandise from plaintiff in the name of the Triangle Drug Club, Inc., and it not having been paid for, suit was brought. The merchandise was delivered in the name of the Triangle Drug Club, Inc., and plaintiff had no knowledge of any restrictions on the power or authority of Dixon; that neither of the defendants had any specific knowledge that the merchandise had been ordered and delivered. These facts were stipulated and it was further stipulated "that defendants had requested said Dixon not to place any orders for merchandise without their consent; that said restrictions were not conveyed to plaintiffs," and they had no knowledge of such

cannot be held individually liable to the plaintiff for the indebtedness incurred," and also a number of cases, in which it is a correct statement of one legal principle applicable to the facts in the case, and that it does not appear from the record that defendant did actively participate in the payment of the books, the question for decision is, did they do this without impliedly assuming to incur the indebtedness, or as a result of which, they would be deemed to have done so, as their agents in payment of their contribution towards city, many other cases, Windsor Co. v. Windsor, 10 Vt. 101, 102 (1836), 10 Vt. 101, 102 (1836) which they say is directly in point with the case at bar.

In that case an attempt was made to organize the male fire club and there was a failure to do so. The members of the association in the office of the secretary of the club, in the meantime, the female fire club engaged in the business of fire insurance in the office of the secretary and had a separate office in East City, Vermont. When the case came in the court as one of the incorporators and also as secretary, and in charge and control of the club of business. The plaintiff in the name of the female fire club, Inc., did not having been paid for, and was known. The corporation was believed in the name of the female fire club, Inc., and plaintiff had no knowledge of any transaction on the part of authority of the club; that either of the defendants had not knowledge that the corporation had been organized and dissolved. These facts were stipulated and it was further stipulated that defendant had no knowledge of the fact that the corporation was organized without their consent; that the corporation was not conveyed to plaintiff, and they had no knowledge of such

restrictions.

Counsel for defendants, in the case at bar, in referring to the Missouri case say: "plaintiffs contended there was no corporation in existence, either de facto or de jure, and therefore the individual incorporators are liable, as such, for the purchase price of the goods bought by Dixon in the name of the incompleated corporation." Continuing they quote from the Missouri case: "Applying these rules to the situation disclosed by the agreed statements of facts, liability cannot attach to defendants individually, unless, in addition to being cosigners of the articles of agreement, they either made or ratified the contract of purchase from plaintiffs. It is not contended defendants made the contracts nor ratified the purchases. Under the agreed statement of facts, it is gleaned the purchases were made by Dixon, contrary to instructions and without defendants' knowledge. It is true that plaintiffs may not have known of these restrictions, but under the rule of caveat emptor, it was their duty to make inquiry. ***

"Liability of the kind sought to be enforced by plaintiffs ***must be supported by some element of estoppel, i. e., the burden was on plaintiffs to show that defendants, by act or word, gave Dixon either express or implied authority to take control in the name of the proposed corporation and to make contracts in its name.

"There is no such evidence here. The agreed statement of facts may be construed to the effect that Dixon acted entirely on his own initiative, without any authority from defendants. It is true defendants signed and acknowledged the articles of association, and that is one step, but only one, in the creation of a corporate entity. It is admitted in the agreed statement of facts there was no authority given to Dixon, and none can be

restoration.

General Torrance, in the case of the, in the
to the Wisconsin case says: "The fact that the
corporation in existence, after its death, was
for the individual incorporators was held, the
purchase price of the goods bought by them is the
incorporated corporation." Continuing they state that the
court says: "Applying these rules to the present situation
by the agreed statements of fact, liability cannot be
defendants individually, unless, in addition to their
of the articles of agreement, they either made or ratified the
contract of purchase from the plaintiff. It is not sufficient
defendants made the contract not ratified the purchase. When
the agreed statement of fact, it is claimed the contract was
made by Dixon, contrary to instructions and without authority.
knowledge. It is true that plaintiff was not aware of
these statements, but under the rule of negligent, it was
their duty to make inquiry."

"Liability of the kind sought to be enforced by plaintiff
cannot be supported by mere statement of defendant, A. B., the
burden was on plaintiff to show that defendant, by act or word,
gave Dixon either express or implied authority to make contract
in the name of the proposed corporation and to make contracts
in its name."

"There is no such evidence here. The agreed statement
of facts may be confined to the effect that Dixon acted negligently
on his own initiative, without any authority from defendant.
It is true defendant signed and acknowledged the articles of
incorporation, and that is one fact, but only one, in the formation
of a corporate entity. It is essential in the agreed statement
of fact there was no authority given to Dixon, and none was

implied, simply because Dixon was in charge of the place of business. Thus, it is clear that defendants cannot be held individually liable." We are unable to agree with all that is said in that case. Moreover, the facts are not in point. There Dixon, who gave the order for the goods, had been requested by defendants not to place any orders for merchandise without their consent. Such is not the fact in the case before us. In the instant case we are of opinion that under the law, Schoene had implied authority to order the pass books.

In Inter-Ocean Co. v. Robertson, 296 Ill. 92, our Supreme Court held that where there was an attempt in good faith to organize a corporation under the law and there was an apparent compliance with the provisions of the law and a user of corporate powers, a corporation de facto existed, notwithstanding its neglect to file for record its certificate of complete organization, and the individual was held not to be personally liable for property sold to the de facto corporation. But in the instant case there was no de facto corporation.

We hold that Schoene had implied authority from defendants to equip the premises for banking purposes including the purchase of the pass books and that defendants are now estopped to say that he did not represent them. Schoene was in the building, furnishing and equipping it for banking purposes. He there maintained a desk; a young lady was also employed to operate the telephone. Signs were placed on the walls of the building announcing the new bank would soon open. It was advertised in the local newspaper. Defendants were some of the persons who applied to the Auditor of Public Accounts for authority to organize the bank, the authority was granted and a permit issued. They also subscribed for stock in the proposed bank and one of them, Pancost, was named as vice-president. In these circumstances we

think Schoene acted as their agent in the purchase of the pass books and that defendants are liable for the purchase price.

Morse v. Ill. P. & L. Corp., 294 Ill. App. 498.

In Pilsen Brewing Co. v. Wallace, 291 Ill. 59, it was sought to hold individuals liable where the corporation had not complied with the statute in changing its name. The court said: "If a liability existed it was not statutory but arose from a failure to comply with the provisions of another act authorizing changing the names of corporations, which contains no similar provision. If there was a liability it rested upon the rule of law that when individuals act under a corporate form and in a corporate name when there is, in fact, no corporation, they have not thereby absolved themselves from personal liability and are liable as partners. Independently of section 18, a company which is not a corporate body is a partnership composed of the officers and subscribers to the articles of association. Bigelow v. Gregory, 73 Ill. 197; Loverin v. McLaughlin, 161 id. 417; Ryerson & Son v. Shaw, 277 id. 524."

In the instant case we are of opinion that defendants are liable under the rule of law just quoted. See also Richardson Fueling Co. v. Seymour, 235 Ill. 319.

For the reasons stated, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against defendants.

JUDGMENT REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

think some are not as their words in the language of the law
works and that sometimes are liable for the same reason.
Waters v. III, I. L. R. 100, 101, 102, 103.

In Wilson v. III, I. L. R. 100, 101, 102, 103.

ought to hold individuals liable when the corporation has not
complied with the statute in carrying out the law. The court said:
"It is liability which is not necessary but a mere form."

failure to comply with the provisions of another act, and therefore
changing the name of corporation, which contains no similar
provision. It seems that a liability is created when the act of

lay that when individuals are named in a corporation, they are
corporate more than there is, in fact, an corporation, they are
not thereby relieved themselves from personal liability. It is

liable as partners. Independently of section 10, a company
which is not a corporate body is a partnership, and the
officers and members are the partners of the company. Section

v. Grayson, 78 II. 107; Grayson v. Grayson, 101 II. 107;

Grayson v. Grayson, 101 II. 107.

In the instant case we are of opinion that the

are liable under the rule of law just stated. The also Grayson

Grayson v. Grayson, 101 II. 107.

For the reasons stated, the judgment of the court

ought of course is reversed and the same remedy with interest
to enter judgment in favor of plaintiff and against defendant.

JUSTICE THOMAS AND JUSTICE WILSON

McDonald, J., and defendant, J., concur.

41715

MIDLAND STEEL AND EQUIPMENT COMPANY,
a corporation,

Appellee,

v.

BOUGLAS AUTO PARTS COMPANY, INC.
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

315 I.A. 207

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant from a judgment in favor of plaintiff, entered in an action at law to recover damages for an alleged breach of a written contract. The complaint, after setting out an accepted purchase order, which is shown at length, alleged: that defendant became obligated to furnish to plaintiff 2,000 tons of truck parts scrap, subject to such slight deviation from quantity as might be necessarily due to the inherent difficulty of furnishing the exact quantity of material of said character; and that defendant furnished a total of 1285.8875 tons of said scrap, but failed and refused, upon plaintiff's demand, to furnish the balance of 714.3125 tons, to the damage of plaintiff in the sum of \$3,464.95. By its amended answer, defendant denied that it became obligated to furnish to plaintiff 2,000 tons of truck parts scrap, and alleged that it was obligated only to sell, to the extent of 2,000 tons, the truck parts scrap contained in four piles located in the yard of defendant; and that it did sell and deliver all of the contents of said four piles.

The plaintiff's general business is that of purchasing scrap, second grade sheet steel, bars and second hand machinery. It buys miscellaneous scrap and junk as a broker and sells it to the steel mills. Defendant's business is that of purchasing automobiles and trucks for the purpose of wrecking them for parts and salvaging for sale such parts as are usable or can be reconditioned.

WILLIAM WATSON & COMPANY, INC.
a corporation

Plaintiff

v.

DOUGLAS AND PATRICK COMPANY, INC.
a corporation

Defendant

CHIEF CLERK

81 E. 1. A. 3

W. J. WATSON, JR., Plaintiff, vs. W. J. WATSON, JR., Defendant

This is an action by the Plaintiff from a judgment in

favor of Plaintiff, entered in an action at law to recover damages for an alleged breach of a written contract. The complaint, after setting out an alleged purchase order, which is shown in Exhibit A; that defendant's contract obligated it to furnish to Plaintiff 2,000 tons of truck parts, subject to such slight deviation from quantity as might be necessitated due to the inherent difficulty of furnishing the exact quantity of material of this character; and that defendant furnished a total of 1,850.525 tons of said parts, but failed and refused, upon Plaintiff's demand, to furnish the balance of 149.475 tons, to the amount of Plaintiff in the sum of \$3,484.25. By its amended answer, defendant denied that it was obligated to furnish to Plaintiff 2,000 tons of truck parts, and alleged that it was obligated only to sell, to the extent of 2,000 tons, the truck parts shown contained in two bills located in the yard of defendant; and that it did sell and deliver all of the contents of said two bills.

The Plaintiff's general defense is that of purchasing scrap, second grade sheet steel, first and second hand machinery. It buys miscellaneous scrap and junk in a broker and sells it to the steel mills. Defendant's business is that of purchasing automobiles and trucks for the purpose of assembling them for parts and delivering for sale such parts as are usable or can be reconstructed.

Its business does not include buying or dealing in scrap, which fact was known to plaintiff. Incidental to its business of wrecking automobiles and trucks for parts, defendant accumulates scrap, being the automobile and truck parts that are not salable, or are broken or worn. This scrap is just the accumulation over a period of time, it sometimes requiring one or two years to accumulate enough for sale. Defendant operates a yard at 1640 South State Street, Chicago, in which the cars and trucks are wrecked and the scrap accumulated. The fact that the accumulation and sale of scrap was incidental is indicated by the testimony of Samuel Weisman, president of defendant, that the defendant's business includes thirty-three different locations in addition to its main store and the yard in question.

Prior to the execution of the contract hereinafter mentioned, defendant, in its said yard, had five piles of accumulated parts scrap—one of automobile castings and the other four of scrap steel. Different estimates of the size of these piles were that they were from twelve to fifteen feet high and from ten to twenty feet square, squared off on top and piled around the sides to furnish a wall so that they would not turn over. Defendant did not know the weight of these piles, as it had no way of weighing them.

Pohn Iron and Metal Company is a Chicago concern dealing in scrap. Albert Weisman, manager of defendant, went to the Pohn yard to see whether he could buy any automobile or truck parts. While there, he was asked by William Pohn whether defendant had any scrap for sale. The following day, Pohn came to defendant's yard and Albert Weisman showed him the piles of scrap. The next day, Pohn and William G. Weiss, president of plaintiff, came to defendant's yard, at which time Pohn offered Weisman \$30,000 for the four piles of steel scrap, but Weisman refused to sell except by the ton. Two days thereafter, Pohn, Weiss, and two men from a steel mill came to the yard. One or both of the men from the mill climbed up on the piles and examined them. One of the mill men guessed the weight at 3500 tons.

The business does not include buying or selling in volume, which fact
 was known to plaintiff. In addition to its business of selling
 automobiles and trucks for parts, defendant's business was
 being the automobile and truck parts that are not sold, or are
 broken or worn. This was in fact the accumulation over a period
 of time, it sometimes requiring one or two years to accumulate enough
 for sale. Defendant operates a yard at 1440 North State Street,
 Chicago, in which the cars and trucks are repaired and the parts
 accumulated. The fact that the accumulation and sale of parts was
 incidental is indicated by the testimony of James W. Hume, president
 of defendant, that the defendant's business included fifty-three
 different locations in addition to the main office and the yard in
 question.
 Prior to the execution of the contract mentioned in question
 defendant, in its said yard, had five other vehicles accumulated with
 one of automobile parts and the other four of other parts.
 Different estimates of the size of these piles were that they were
 from twelve to fifteen feet high and from ten to twenty feet square,
 stacked off on for and off around the yard so that a walk
 that they would not turn over. Defendant did not know the weight of
 these piles, as it had no way of weighing them.
 John Iron and Steel Company is a Chicago company dealing
 in iron. Albert W. Hume, manager of defendant, went to the main
 yard to see whether he could buy any automobile parts. There
 there, he was asked by William W. Hume whether defendant had any cars
 for sale. The following day, John came to defendant's yard and
 Albert W. Hume showed him the size of some of the piles of parts,
 and William W. Hume, president of plaintiff, took to defendant's yard,
 at which time John W. Hume showed him the size of the piles of
 steel scrap, but when returned he will amount up to one ton. The size
 thereafter, John, Hume, and the man from the yard came to the
 yard. One or both of the men from the yard stood up on the pile
 and examined them. One of the men examined the weight of the pile.

There is conflicting evidence as to whether Albert Weisman made a guess. Mr. Weiss admitted that all the persons present were just guessing as to the weight. Pohn's offer of \$30,000 for the four piles was renewed and Albert Weisman again refused to sell except by the ton. Pohn wished to buy at least 2,000 tons and Albert Weisman replied that he didn't know whether he could sell that much. Pohn testified that "I thought there was around 3500 tons, or I wouldn't have offered him \$30,000".

Samuel Weisman testified that, in reply to Pohn's offer of \$30,000 made to him, he first asked Pohn "How do you come to that figure?" and Pohn replied: "That is what it is worth to me and I will give you \$30,000 and give you that right on the line". Weisman also said that defendant could only sell what it had in the piles and it did not want to sell it as a lump. Samuel Weisman also said to Pohn in this same connection that he did not want to sell for a lump sum of \$30,000 because he did not know what was in the piles and he did not want to "sting" either Pohn or himself in selling the whole piles as it might be more or it might be less. "That is all we have got there to sell is what you see and I don't want to obligate myself for anything else but what you see there". Weisman also testified that Pohn wanted to buy 2,000 tons or "half of the piles" and that Weisman replied "I don't know how much is in there, you tell me half", and that Pohn replied "We estimated it. We had the steel company, they examined the steel there and they estimated between three and four thousand tons." The following day Pohn and Weiss returned to defendant's yard, and brought with them a contract which plaintiff had prepared. This contract, after the changes indicated on the face thereof were made, was signed, and is, as follows:

"Duplicate

Confirmation of Purchase
Telephones: Wabash 0680
Wabash 0681
Wabash 0682

There is conflicting evidence as to whether there was a sale.
Mr. Tolson testified that all the persons present were just talking to
to the subject. John's offer of \$50,000 for the four girls was refused
and Albert Weisman again refused to sell except for the \$50,000.
Weisman wanted to pay at least \$2,000 more and Albert Weisman replied that
he didn't know whether he could sell that much. John testified that
"I thought there was around \$200,000, or I wouldn't have offered
him \$50,000".
Weisman testified that, in reply to John's offer of
\$50,000 made to him, he first asked John "how do you come to that
figure?" and John replied: "That is what it is worth to me and I
will give you \$50,000 and give you that much on the line". Weisman
also said that defendant could only sell what it had in the girls and
it did not want to sell it as a favor. Weisman also said that
John in this same connection said he did not want to sell for a favor
sum of \$50,000 because he did not know what was in the girls and he
did not want to "take" either John or himself in selling the girls.
John said he might be more or it might be less. "That is all we have
got there to sell in what you see and I don't want to estimate myself
for anything else but what you see there". Weisman also testified
that John wanted to pay \$50,000 for the girls and that
Weisman replied "I don't know how much is in there, you tell me that",
and that John replied "I estimated it. It was the best estimate,
they estimated the steel bones and they estimated between three and
four thousand tons". The following day John and Weisman returned to
defendant's yard, and brought with them a contract which defendant had
prepared. This contract, after the signature indicated on the last
three of were made, was signed, and is as follows:

"Applicator

Continuation of transcript
Telephone: 4-1234
Room 1001
Date: 10-1-50

MIDLAND STEEL & EQUIPMENT CO.
400-406 South Clinton Street
Chicago

No. 4680

JFW:BL

August 29, 1939

Name Douglas Auto Parts Company, Inc.
Address 1640 South State Street, Chicago, Ill.
This confirms purchase made of Mr. Douglas Weisman

WEIGHTS Approx. 2,000 tons

DESCRIPTION Truck parts Scrap, as inspected
Equal amounts to be removed from the top of the
four piles inspected.

PRICE Ten Dollars (\$10.00) per net ton.

F.O.B. CARS Your Yard.

Terms \$10,000.00 deposit with order; balance to be paid
as material is shipped.

Shipment to be Made Material to be removed within sixty days.

By Pohn Iron and Metal Co.

(Describe Material in your Bill
of Lading as)

REMARKS Consumers weights and grading to govern settlement.
Railroad weights.
As per arrangements made with Mr. Douglas Weisman.

- NOTE: 1. If the material is not shipped on or before the time
specified herein, the purchaser has the privilege of
cancelling this contract without notice.
2. All cars shipped on this order must be loaded to Railroad
minimum or excess freight will be charged to sellers account.

MIDLAND STEEL & EQUIPMENT CO.
BY W. G. WEISS

Accepted by Douglas Auto Parts Co.
A. Weisman

Date"

It is to be noted that this contract provides for the sale
of "Approx. 2,000 tons Truck Parts Scrap, as inspected Equal amounts
to be removed from the top of the four piles inspected." William
G. Weiss, president of plaintiff, testified that he wanted to see
the scrap he was buying; that he was interested in seeing the scrap
he bought; that he saw 2,000 tons; that he wanted to see the scrap in
every single ton physically with his own eyes; that the words "truck
parts scrap" were typed into the contract in his office; that the mill

MINERAL SPRING & COMPANY, INC.
200-400 South Lincoln Street
Chicago

NOV. 1932

November 12, 1932

TO: J.P. KEL

Name Douglas Auto Parts Company, Inc.
Address 1840 South State Street, Chicago, Ill.
This confirms purchase made of Mr. Douglas

QUANTITY Approx. 5,000 tons

DESCRIPTION Truck parts (approx. 5,000 tons) as indicated
Amount amounts to be removed from the top of the
four piles indicated.

PRICE Ten dollars (\$10.00) per net ton.

P.O.D. CASE Your order.

TERMS \$10,000.00 payable with order; balance to be paid
as material is delivered.

SHIPMENT Material to be removed within sixty days.
to be made

BY JOHN IRON AND STEEL CO.

(Description material in your bill
of lading as)

REMARKS Commonplace weights and quantity to govern settlement.
Railroad weights.
As per correspondence made with Mr. Douglas.

NOTE: 1. If the material is not shipped on or before the time
specified herein, the contract is the privilege of
canceling this contract without notice.

2. 51 cars shipped on this order must be loaded to minimum
minimum or excess weight will be charged to seller's account.

MINERAL SPRING & COMPANY, INC.
200-400 South Lincoln Street
Chicago

Accepted by Douglas Auto Parts Co.
A. Johnson

Date

It is to be noted that this contract provides for the sale

of "Approx. 5,000 tons truck parts, as indicated, subject to be

to be removed from the top of the four piles indicated." It is

also, president of plaintiff, testifies that he wanted to see

the terms he was willing; that he was interested in seeing how much

he bought; that he saw 5,000 tons; that he wanted to see the way in

every single ton especially with his own eyes; that the words "approx.

parts company" were typed into the contract as his witness; that the bill

inspectors wanted to make sure that the scrap which was delivered to them was the scrap they saw; that the scrap plaintiff was interested in getting was what he had seen and that was why he inspected this material as No. 1 heavy melting steel, there was no mention in the contract of No. 1. heavy melting steel but only "truck parts scrap, as inspected"; and that the phrase "equal amounts to be removed from the top of the four piles inspected" was put in the contract at the suggestion of the mill men because they wanted to make sure that the scrap which was delivered to them was that which they saw.

Pohn Iron & Metal Company removed the contents of all four piles, the weight of which was ascertained to be 1285.6875 tons. When Weiss called Albert Weisman on the telephone with reference to the claimed shortage, Weisman replied: "That is all there was. I just sold you what there was in the four piles and that is all". A number of exhibits are included in the statement of facts, concerning correspondence between plaintiff and defendant regarding the alleged deficiency.

The trial court found that plaintiff bought and defendant sold "truck parts scrap as inspected" in the four piles of scrap at defendant's yard, but entered judgment in favor of the plaintiff and against the defendant for \$3,424.87 and costs.

The defendant suggests that in construing a written instrument, the whole instrument must be taken together, in order to arrive at the intention of the parties. This is the general rule that applies in construing a written contract such as is the subject of this controversy. Plaintiff's theory in this case is that the contract called absolutely for the sale of approximately 2,000 tons, but defendant suggests that this theory would be applicable only if the provision "truck parts scrap, as inspected, equal amounts to be removed from the top of the four piles inspected" had not been a part of the contract. Defendant further argues that this theory becomes untenable when this provision is considered, and, even without the aid of evidence as to surrounding circumstances, the only proper construction of the contract,

as a whole, is that it dealt with the definite truck parts scrap which was contained in the four piles and had been inspected. The intention of the parties is to be determined from the language employed, when read in the light of the context of the instrument and such surrounding circumstances as will aid the court in arriving at the true intention and meaning of the parties.

The plaintiff urges that this was not a contract to sell a specific lot of goods in the sense that it was a sale of the four piles of scrap regardless of their contents, but was a contract to deliver 2,000 tons of scrap of the quality inspected by first taking scrap evenly from the tops of the four piles and then using other scrap, if necessary, to fill the order. Plaintiff agrees that an instrument must be read as a whole to determine its meaning, that the meaning of the language used in a contract when there is any doubt as to its meaning must be determined in the light of the surrounding circumstances, and that a contract is construed most strongly against the party who prepared it, if the contract is ambiguous. However, plaintiff contends that the contract in question contains no ambiguity.

The point of most importance, therefore, seems to be the construction of that part of the contract which provides "Truck parts scrap as inspected Equal amounts to be removed from the top of the four piles inspected", and the words "Approx. 2,000 tons". Defendant suggests that the words "Approx. 2,000 tons" were only words of limitation, and that the contract shows on its face that it was an agreement to sell specific property. As we read and understand the contract before us, the number of tons that was purchased was fixed by the fact that there were four piles, in which there was "approx. 2,000 tons" of scrap. Webster's Dictionary defines "approximate" as "an approach to a correct estimate, or to a given quantity or quality". When we consider the words "approx. 2,000 tons", as used in the contract, they would seem to mean and to have been used by the parties

...a whole, is that it deals with the various words which
which are contained in the text of the law, and which are
intention of the parties is to be determined from the language
employed, when read in the light of the history of the instrument
and such surrounding circumstances as will aid in the determination
of the true intention and meaning of the parties.
The principle upon which this law is based is that in the
a specific list of words in the text of the law, and in the
list of words in the text of the law, and in the list of words
deliver 1,000 tons of goods of the quality intended by these words
every evenly from the back of the lot which was then raised other
text, it is necessary, as will be seen, to determine the meaning
instrument must be read as a whole to determine its meaning, and
the meaning of the language used in a contract must be determined
as to its meaning must be determined in the light of the surrounding
circumstances, and that a contract is construed most strongly against
the party who prepared it, if the contract is ambiguous. However,
statute contains that the contract is construed against the party
The point of view is that, in the contract, the words "four
construction of the text of the contract which involves the
text as intended shall be read as intended from the top of the
four lines indicated", and the words "four tons", "four
suggests that the words "four tons" were only words of
limitation, and that the words "four tons" are not words of
agreement to sell specific property. It is not possible to determine the
contract unless we know that the words "four tons" are words
by the fact that these words are used in the text of the law.
1,000 tons of goods, and that the words "four tons" are words
"an attempt to a contract delivery, as in a given quantity of quality".
then we consider the words "four tons", as used in the
contract, they would seem to mean and to have been used by the parties

as "an approach to a correct estimate". Applying this definition to the contract, the words used would seem to mean that the parties, in effect, made an estimate of the amount of scrap that was contained in the four piles, the figure of 2,000 tons being the approximate amount that was contained in them.

Defendant calls attention to the case of Sheffield Steel & Iron Co. v. Jos. Joseph & Brothers Co., 238 Ill. App. 45. That was an appeal by the defendant from a judgment against it for \$5,300, plaintiff claiming damages for nondelivery of approximately 900 tons of steel billets purchased by plaintiff from defendant in 1919, and for freight paid by plaintiff on four cars of such steel which were rejected because the material shipped therein was not according to the contract. Quoting from a portion of the opinion, the court in that case said;

" . . . But apart from the letters there was some evidence tending to support defendant's theory that plaintiff had full knowledge of the fact that defendant's only source of supply was the material purchased from the Government, and that the contract between the parties was made upon that basis, calling for the delivery to the plaintiff, as the same should be shipped by the Government, of the same 'approximate' quantity of the specified steel billets which defendant had purchased from the Government. If, in fact, the contract between plaintiff and defendant was made upon that basis, - as the contract itself and the letter of August 7, 1919, seems to indicate - and if plaintiff received from defendant all the specified material which was actually delivered to defendant by the Government, defendant is not liable for not delivering the remainder of the 'approximate' quantity specified In other words, if such be the facts, the contract as made was a conditional one, in which defendant's obligation to deliver the specified quantity to the plaintiff was dependent upon the supply in the hands of the Government, and if plaintiff received from defendant all the specified material the government delivered to defendant, there was no breach of the contract. Defendant offered several instructions on this theory, which it was error for the court to refuse."

It is, thus, apparent from the facts in that case that the defendant there delivered all the steel billets to plaintiff which defendant received from the Government. Under such circumstances, the court held that there was no breach of the contract. As suggested, in the instant case approximately 2,000 tons of truck parts scrap was the amount which plaintiff wished to purchase, and 1285.6875 tons was the amount delivered, being all that the defendant had in its four piles

as an agreement to a contract of sale. The contract, the terms of which were to be set forth in the contract, was an estimate of the amount of work that was to be done in the year 1914. The figure of \$1,000 was being the maximum amount that was contained in them.

Defendant calls attention to the fact that in the case of United States v. Lee, James & Roberts Co., 100 Ill. App. 2d 100, that was an appeal by the defendant from a judgment rendered in 1911, and of actual bills rendered by plaintiff from defendant in 1911, and for freight paid by plaintiff on four cars of wood which were rejected because the material rejected therein was not conforming to the contract. Another from a portion of the contract, the court in that case said:

... It is clear from the facts that there was some violation tending to support defendant's theory that plaintiff had full knowledge of the fact that defendant's only source of supply was the material purchased from the government, and that the contract between the parties was made upon that basis, calling for the delivery of the material, as the same should be subject to the government, of the same 'approximate' quantity of the material stated in the contract. Defendant had purchased from the government, in fact, the contract between plaintiff and defendant was made upon that basis, - in fact - contract itself and the latter of June 9, 1910, when it is stated and if plaintiff received from defendant all the material which was actually delivered to defendant by the government, defendant is not liable for not delivering the same in the 'approximate' quantity specified. . . . In other words, it was the fact that the contract as made was a contract for, in which defendant's obligation to deliver the specified quantity to the plaintiff was dependent upon the supply in the hands of the government, and if plaintiff received from defendant all the material stated in the contract, then was no breach of the contract. Defendant offered several explanations as to why, which it was error for the court to refuse.

It is, thus, apparent from the facts in that case that the defendant there delivered all the material to plaintiff which was actually received from the government. When such circumstances, the court held that there was no breach of the contract. As suggested, in the instant case approximately 1,000 tons of timber were taken and the amount which plaintiff wished to purchase, and 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 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2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 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3552, 3553, 3554, 3555, 3556, 3557, 3558, 3559, 3560, 3561, 3562, 3563, 3564, 3565, 3566, 3567, 3568, 3569, 3570, 3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 38

of truck parts scrap. In the Sheffield case the plaintiff knew that defendant was limited to what it might receive from the Government; and in the instant case the plaintiff knew that defendant was limited by the amount of truck parts scrap it had on hand in the four piles. It follows, therefore, that defendant is not liable for not delivering the remainder of the "approx." quantity specified. Such a holding seems to agree with the authority of the Sheffield case where the defendant's obligation to deliver depended on a limited source of supply from the Government. The better construction of the word "approximately", as used in the contract in question, would be that its meaning is limited to the amount of truck parts scrap actually on hand, where plaintiff knew that defendant's only source of supply was such accumulation of scrap as then was on hand.

It is urged by defendant that it completely fulfilled the contract by delivering all of the contents of the four piles inspected, and we agree with the suggestion offered. From the facts as detailed in this opinion as well as under the terms of the contract, we are of the opinion that plaintiff received all that was called for by the contract. Other questions appear in the briefs of the parties, but we are satisfied, from the questions passed upon in this opinion, that the trial court erred in entering judgment for plaintiff. The trial court judgment is, therefore, reversed, and the cause remanded to the trial court with directions that the court find the issues for defendant and enter judgment thereon against plaintiff.

JUDGMENT FOR PLAINTIFF REVERSED
AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J. AND KILEY, J. CONCUR.

of from party to party. In the Shelley case the plaintiff knew that defendant was limited to what it might recover from the defendant; and in the instant case the plaintiff knew that defendant was limited by the amount of from party to party it had in hand in the same line. It follows, therefore, that defendant is not liable for not delivering the remainder of the "approx." quantity specified. From a solidly seems to agree with the authority of the Shelley case where the defendant's obligation to deliver amounted to a limited amount of money from the defendant. The defendant's obligation of the way "approximately", as used in the contract in question, would be that its meaning is limited to the amount of from party to party actually on hand, where plaintiff knew that defendant's only source of supply was such accumulation of money as then was on hand.

It is urged by defendant that it completely fulfilled the contract by delivering all of the contents of the box after inspection, and we agree with the suggestion offered. From the facts as stated in this opinion as well as under the terms of the contract, we are of the opinion that plaintiff received all that was called for by the contract. Other questions arise in the trial of the case, but we are satisfied, from the facts as stated above in this opinion, that the trial court was in entering judgment for plaintiff. The trial court judgment is, therefore, reversed, and the case remanded to the trial court with directions that the court enter judgment for defendant and enter judgment against plaintiff.

REVEREND JUSTICE OF THE PEACE
JAMES H. HARRIS, JUDGE

WITNESSES, J. J. HARRIS, J. HARRIS.

41504

MARY JANKOWSKI, Administratrix
of the Estate of FRANK JANKOWSKI,
Deceased, for use of CLYDE HOLLARIS,
& Minor, by ALBERT HOLLARIS, Guar-
dian,

Appellant,

v.

GENERAL ACCIDENT FIRE & LIFE
ASSURANCE CORP., LTD., Garnishee,
Appellee.

15
IN GARNISHMENT

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

315 I.A. 238

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Clyde Hollaris, a minor, by Albert Hollaris, Guardian,
recovered a judgment for \$20,000 against Mary Jankowski,
Administratrix of the Estate of Frank Jankowski, deceased,
for damages for personal injuries sustained by the minor due
to the alleged negligent operation of a motor truck by Frank
Jankowski, deceased. The parties to the instant appeal stipulated
that after the entry of the judgment in the personal injury case
and within the time provided by the statute and the rules of the
Appellate court for this District, a notice of appeal was filed
in the trial court and notice of the intention to file duly served
on the attorney for plaintiff; that a transcript of the testimony
heard at the trial had been prepared by the appellant in the per-
sonal injury case and that this transcript was at the time of the
filing of the stipulation in the hands of the plaintiff's attorney.
We may state that the records of this court show that the record
from the trial court in the personal injury case has been filed in
this court; also an abstract of record and briefs on behalf of the
appellant and appellee; that oral arguments have been requested.
No appeal bond was filed by the judgment debtor nor by the garnishee
defendant and execution issued on the judgment was returned nulla
bona by the sheriff. After the appeal had been perfected in this
court the instant garnishment proceeding was filed. The defendant
garnishee, General Accident Fire & Life Assurance Corporation, Ltd.,

41504

MARY JANOWSKI, Administrix of the Estate of FRANK JANOWSKI, Deceased, for use of CLM, Guarantor, by ALBERT HOLMIST, Guarantor, Appellant,

v.

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO., LTD., Appellee.

COURT OF COMMONS

Plaintiff in this case, a minor, by Albert Holmista, Administrix of the Estate of Frank Janowski, deceased, recovered a judgment for \$20,000 against Mary Janowski, Administrix of the Estate of Frank Janowski, deceased, for damages for personal injuries sustained by the minor due to the alleged negligent operation of a motor truck by Frank Janowski, deceased. The parties to the instant appeal stipulated that after the entry of the judgment in the personal injury case and within the time provided by the statute and the rules of the Appellate court for this District, a notice of appeal was filed in the trial court and notice of the intention to file duly served on the attorney for plaintiff; that a transcript of the testimony heard at the trial had been prepared by the appellant in the personal injury case and that this transcript was at the time of the filing of the stipulation in the hands of the plaintiff's attorney. We may state that the records of this court show that the record from the trial court in the personal injury case has been filed in this court; also an abstract of record and briefs on behalf of the appellant and appellee; that oral arguments have been requested. No appeal bond was filed by the judgment debtor nor by the garnishee defendant and execution issued on the judgment was returned nil bona by the sheriff. After the appeal had been perfected in this court the instant garnishment proceeding was filed. The defendant garnishee, General Accident Fire & Life Assurance Association, Ltd.,

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had entered into a contract of insurance with the judgment debtor, deceased, by the terms of which the garnishee defendant carried a public liability insurance policy upon the truck of the judgment debtor involved in the accident. In view of the position taken by the garnishee defendant it is unnecessary to state all of the interrogatories and answers thereto that were filed in the garnishment proceeding. The garnishee defendant answered, "Yes," to the following interrogatory: "On and prior to August 14, 1937, did the above named Frank Jankowski have a policy of insurance in your company insuring a certain motor truck of the said Frank Jankowski as to public liability for injuries to the general public sustained or caused by the said motor truck or motor vehicle which said motor truck or motor vehicle was involved in an accident causing injuries to Clyde Hollaris on or about August 14, 1937, at about 9:30 a. m., in an alley which ran parallel with and adjacent to North Avenue, in the 1500 block thereof, and approximately behind the premises known as 1514 West North Avenue, Chicago, Illinois, which said accident was the basis of the above entitled suit and resulted, upon trial, in a judgment in favor of the said Clyde Hollaris and against one Mary Jankowski, Administratrix of the Estate of Frank Jankowski, deceased, in the sum of \$20,000.00?" It also answered that by reason of the terms of the policy it furnished an attorney to defend the cause in the trial court; that it paid the expenses of investigation, preparation and defense of the cause; that it employed an attorney to represent the judgment debtor upon the appeal to this court. It also answered that the coverage limits for public liability, under the terms of the policy, were \$10,000 for bodily injuries for each person. The garnishee defendant attached a specimen copy of the policy to one of its answers. After the answers had been filed by the garnishee defendant the beneficial plaintiff moved for judgment

... entered into a contract of insurance with the ...
... by the terms of which the ...
... public liability insurance policy upon the ...
... involved in the accident. In view of the position taken by
the garnishes defendant it is unnecessary to state all of the
interrogatories and answers thereto that were filed in the garnish-
ment proceeding. The garnishes defendant answered, "Yes," to the
following interrogatory: "On and prior to August 14, 1937, did
the above named Frank Janowski have a policy of insurance in your
company insuring a certain motor truck of the said Frank Janowski
as to public liability for injuries to the general public sustained
or caused by the said motor truck or motor vehicle which said motor
truck or motor vehicle was involved in an accident causing injuries
to Clyde Hollands on or about August 14, 1937, at about 9:30 a. m.,
in an alley which ran parallel with and adjacent to North Avenue,
in the 1500 block thereof, and specifically within the premises
known as 1514 West North Avenue, Chicago, Illinois, which said
accident was the basis of the above entitled suit and verdict,
upon trial, in a judgment in favor of the said Clyde Hollands
and against one Harry Janowski, administrator of the estate of
Frank Janowski, deceased, in the sum of \$20,000.00?" It also
answered that by reason of the terms of the policy it furnished
an attorney to defend the cause in the trial court; that it paid
the expenses of investigation, preparation and defense of the
cause; that it employed an attorney to represent the judgment
debtor upon the appeal to this court. It also answered that
the coverage limits for public liability, under the terms of the
policy, were \$10,000 for bodily injuries for each person. The
garnishes defendant attached a specimen copy of the policy to
one of its answers. After the answers had been filed by the
garnishes defendant the judicial administrator moved for judgment

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pro tanto against the garnishee defendant upon its sworn answers. The trial court entered an order denying the motion and discharging the garnishee defendant. The beneficial plaintiff appeals.

The pertinent parts of the policy in question provide:

"I. Coverage A -- Bodily Injury Disability

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

*** . . .

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"7. Action Against Corporation. No action shall lie against the corporation unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the corporation, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

"Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the corporation as a co-defendant in any action against the insured to determine the insured's liability.

"Bankruptcy or insolvency of the insured shall ²⁴¹not relieve the corporation of any of its obligations hereunder." (Italics

The trial court entered an order denying the motion and summarizing the facts against the defendant. The defendant's motion for summary judgment was denied. The pertinent parts of the policy in question provide:

"I. Coverage A -- Bodily Injury Disability
"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the disability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the operation, maintenance or use of the automobile.

"7. Action Against Corporation. No action shall lie against the corporation unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured, or by written agreement of the insured, the chairman, and the corporation, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

"Any person or his legal representative who has secured such judgment or written agreement shall thereupon be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the corporation as a co-defendant in any action against the insured to determine the insured's liability.

"Sanctity of insolvency of the insured shall not relieve the corporation of any of its obligations hereunder." (Emphasis added.)

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ours.)

The theory of the beneficial plaintiff is:

"1. The judgment debtor's 'obligation (as an insured of the said garnishee insurance company) to pay' damages to the judgment creditor has been 'finally determined by judgment against the insured after actual trial' at the sum of Twenty Thousand Dollars.

"2. An execution issued thereon had been returned nulla bona by the sheriff of Cook County.

"3. The garnishee insurance company has bound itself, by written contract--

"'To pay on behalf of the insured' (the judgment debtor herein) 'all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages *** because of bodily injury *** sustained by any person or persons caused by accident and arising out of the ownership, maintenance, or use of the automobile.'

"4. By the same written agreement, the garnishee insurance company further agreed that--

"'Any person or his legal representative who has secured such judgment *** shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured.'

"5. Under oath, the garnishee insurance company expressly admitted the extent of its coverage to be Ten Thousand Dollars.

"6. No stay order or supersedeas of any kind has ever been procured to prevent the enforcement and collection of said judgment.

"7. THEREFORE, upon the admissions in the sworn answer of the garnishee insurance company to the additional interrogatories propounded to it, there should have been a judgment entered against

ours.)

The theory of the beneficial interest is:

"1. The judgment debtor's 'policy' (as it is called)

of the said garnishee insurance company) to pay, in case of

the judgment creditor has been 'legally assigned by the insured

against the insured after actual trial, at the sum of Twenty

Thousand Dollars.

"2. An execution issued thereon has been returned null and

void by the sheriff of Cook County.

"3. The garnishee insurance company has found itself,

by written contract--

"To pay on behalf of the insured, (the judgment debtor)

herein, all sums which the insured shall become obligated to pay

by reason of the liability imposed upon him by law for damages

*** because of bodily injury *** sustained by any person or

persons caused by accident and arising out of the ownership,

maintenance, or use of the automobile.

"4. By the same written contract, the garnishee insurance

company further agreed that--

"Any person or his legal representative who is injured

such judgment *** shall thereafter be entitled to recover under

the terms of this policy in the same manner and to the same

extent as the insured.

"5. Under oath, the garnishee insurance company has

admitted the extent of its coverage to be Ten Thousand Dollars.

"6. No stay order or writ of habeas corpus of any kind has ever

been procured to prevent the enforcement and collection of said

judgment.

"7. Therefore, upon the admission in the above answer

of the garnishee insurance company to the additional interrogatories

propounded to it, there should have been a judgment entered against

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the said garnishee insurance company upon its said answer to said additional interrogatories pro tanto to the extent of its coverage, viz: ~~the~~ the sum of Ten Thousand Dollars together with interest on said sum from the date of the judgment in the original action and all legal court costs awarded the judgment creditor herein."

The sole defense of the garnishee defendant is that the garnishment proceedings were prematurely brought because there was an appeal from the judgment in the original suit then pending in this court and, therefore, "under the terms of the policy there was no final determination by judgment as required by the policy."

Under the provisions of the Civil Practice Act an appeal does not suspend the operation of the judgment appealed from unless the appellant, after notice duly served, gives and files bond within thirty days after entry of such judgment or within such further time as the trial court may allow within such thirty days, and as the defendant in the original suit did not file a bond the plaintiff in that suit was not obliged to await the outcome of the appeal as he had the clear right to obtain satisfaction of his judgment by all appropriate means. It is conceded that the only way that the judgment debtor could have suspended that right was to file an appeal bond which would operate as a supersedeas. The policy provides that no action will lie against the insurer "until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the corporation," and the garnishee defendant contends that under this provision no action would lie against it until the right of appeal had been exhausted. We are unable to agree with this contention. If the garnishee defendant intended the policy to have the effect

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the said garnishee insurance company was not liable to
 said additional interrogatories and to the extent of its
 coverage, viz: - the sum of Ten thousand dollars to wit: the
 interest on said sum from the date of the judgment in the
 original action and all legal costs awarded the judgment
 creditor herein."

The sole defense of the garnishee defendant is that the
 garnishment proceedings were irregularly brought because there
 was an appeal from the judgment in the original suit then pend-
 ing in this court and, therefore, "under the terms of the policy
 there was no final determination by judgment as required by the
 policy."

Under the provisions of the civil practice act an appeal
 does not suspend the operation of the judgment appealed from
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 such further time as the trial court may allow within such thirty
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 bond the plaintiff in this suit was not obliged to await the
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 judgment against the insured after actual trial or by written
 agreement of the insured, the claimant, and the corporation,"
 and the garnishee defendant contends that under this provision
 no action would lie against it until the right of appeal had
 been exhausted. It is unable to agree with this contention
 if the garnishee defendant intended the policy to have that effect

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it would have used language similar to that used in the policy in Scott v. Inter-Insurance Exchange, 352 Ill. 572, 580, viz:

"No action shall be maintained against the exchange *** unless brought after the liability *** shall have been fixed either by a final judgment against the assured ***." The distinction between the two provisions is obvious and it is made still clearer by the further provision in the instant policy that "No action shall lie against the corporation *** unless suit is instituted within two years and one day after the date of such judgment or written agreement." Paragraph 7 in the policy provides that "Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured." Plaintiff commenced garnishment proceedings against the insurance company instead of instituting direct proceedings against it, but plaintiff had the right to follow either method. (See Bartkowski v. Commercial Casualty Ins. Co., 275 Ill. App. 497, 512; Pogline v. Central Mutual Ins. Co., 280 Ill. App. 5, 10.) If plaintiff had proceeded directly against the garnishee defendant the pendency of the appeal without an appeal bond would not have been a defense to the action. Why should it constitute a defense to the garnishment proceeding?

The beneficial plaintiff cites Maringer v. Bankers Indemnity Ins. Co., 288 Ill. App. 335, in support of his contention that he was entitled to judgment pro tanto against the garnishee defendant. In that case the plaintiffs in the garnishment proceeding, on November 8, 1935, recovered a judgment for \$3,529.50 against the Insurance Company garnishee. The garnishment proceedings were based upon a judgment for \$3,500 entered on May 3, 1935, against the defendants Leslie Maringer and Virgil Maringer. An execution was returned unsatisfied on June 6, 1935. Following the entry of

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"The action shall be void in and against the exchange *** unless in Scott v. International Exchange, 323 Ill. 772, 780, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242,

by the further provision in the instant policy that "No action between the two provisions is obvious and it is made still clearer by the fact that the insured was assured against the distinction The distinction

legal representative who has secured such judgment or written consent." Paragraph 7 in the policy provides that "Any person or

the insurance company in lieu of instituting direct proceedings against "Plaintiff concerned garnishment proceedings against this policy in the same manner and to the same extent as the

It plaintiff had proceeded directly against the defendant.

The beneficial plaintiff office Winnor v. Winnor and the garnishment proceedings;

November 8, 1935, recovered a judgment for \$3,250.00 and that in that case the plaintiff in the garnishment proceeding, on

the defendant Leslie Ringer and his wife
was returned unsatisfied on June 6, 1935. Following

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the judgment in the original suit, the defendants, represented by the attorneys for the Insurance Company, perfected an appeal to this court and the records of this court show that no bond was given upon the appeal. While the appeal was pending the garnishment proceedings were commenced, on September 16, 1935. The Appellate court said (pp. 346, 347): "We quite agree with the defendant that the plaintiff must recover if at all against the defendant insurance company upon the ground that the action is one covered by the terms of the insurance policy, and is an indebtedness due from the company to the Maringers. This indebtedness became fixed and certain when the judgment was entered in the negligence action against the Maringers, and the plaintiff in the instant case was entitled to the judgment against the garnishee, defendant. It follows from the views herein expressed that the trial court did not err in entering judgment, and it is therefore affirmed." (Italics ours.) The Appellate court stated that it had already affirmed the judgment in the original suit and that no further steps had been taken to present the matter to the Supreme court of Illinois, and the garnishee defendant in the instant case contends that the decision in the Maringer case was based upon the fact that the obligation of the Insurance Company to pay had been finally determined. We cannot agree with this contention, as the garnishment proceedings were instituted in the nisi prius court while the appeal from the negligence judgment was still pending and undisposed of, and the Appellate court sustained judgment in the garnishment proceedings upon the theory that the indebtedness became fixed and certain when the judgment was entered in the negligence action. If the Appellate court had not so held, the garnishment proceeding would have been prematurely brought and the Appellate court would have been compelled to reverse the judgment

the judgment in the original suit, the defendant, represented by the attorney for the Insurance Company, requested an appeal to this court and the records of this court show that no bond was given upon the appeal. While the appeal was pending the garnishment proceedings were continued, on September 10, 1935. The Appellate court said (p. 346, 347): "We quite agree with the defendant that the plaintiff must recover if it will against the defendant insurance company upon the ground that the action is one covered by the terms of the insurance policy, and is an indebtedness due from the company to the assignors. This indebtedness became fixed and certain when the judgment was entered in the negligence action against the defendant, and the plaintiff in the instant case was entitled to the judgment against the garnishee, defendant. It follows from the views herein expressed that the trial court did not err in entering judgment, and it is therefore affirmed." (Italics ours.) The Appellate court stated that it had already affirmed the judgment in the original suit and that no further steps had been taken to present the matter to the Appellate court of Illinois, and the garnishee defendant in the instant case contends that the decision in the negligence case was based upon the fact that the obligation of the Insurance Company to pay had been finally determined. We cannot agree with this contention, as the garnishment proceedings were instituted in the negligence court while the appeal from the negligence judgment was still pending and undisposed of, and the Appellate court is a final judgment in the garnishment proceedings upon the theory that the indebtedness became fixed and certain when the judgment was entered in the negligence action. If the Appellate court had not so held, the garnishment proceedings would have been presented to the Appellate court would have been compelled to reverse the judgment

entered in that proceeding. The garnishee defendant cites in support of its position Roberts v. Central Mutual Ins. Co., 285 Ill. App. 408. There it appears that the bond which the Insurance Company gave was furnished pursuant to the provisions of a mandatory statute. The condition required by the statute and the bond is that the Insurance Company shall pay all final judgments. The Appellate court held (p. 414): "Final judgment as used in the statute and bond meant a judgment in which the parties no longer had a right to have it changed by the court that entered it or to have it reviewed by appeal to a court of review." The only case cited by the court in support of its ruling is Dean v. Marshall, 35 N. Y. S. 724, where the court considered the meaning of the words "final judgment" as used in a stipulation. However, the language used in the bond in the Roberts case differs materially from the language used in the instant policy. The garnishee defendant also cites several decisions of sister states, but each is readily distinguishable from the case at bar. 142
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The garnishee defendant states that the verdict in the negligence suit was for \$20,000 and the limit of its policy for one accident was \$10,000; that "in such a case the insurance company would have no right to put up a bond for the full amount of the judgment and would be precluded from appeal if they were required to pay before the Appellate Courts had passed on the judgment; that is assuming, as in the instant case, that the insured could not make bond;" that "it is a very common happening in these days of jury verdicts for the insured under an automobile policy to take out insurance for five thousand dollars and be held by a jury for a judgment in a much larger amount." It appears, therefore, that the instant situation is one that the insurance company might expect, and, as has often been said by courts of

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The garnishee defendant states that the verdict in the negligence suit was for \$20,000 and the limit of its policy for one accident was \$10,000; that "in such a case the insurance company would have no right to put up a bond for the full amount of the judgment and would be precluded from appeal if they were required to pay before the Appellate Courts had passed on the judgment; that is assuming, as in the instant case, that the insured could not make bond;" that "it is a very common happening in these days of jury verdicts for the insured under an automobile policy to take out insurance for five thousand dollars and be held by a jury for a judgment in a much larger amount." It appears, therefore, that the instant situation is one that the insurance company might expect, and, as has often been said by courts of

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appeal, an insurance company is not obliged to engage in the insurance business. Here the garnishee defendant voluntarily issued the policy in question and it could have protected itself against the predicament that it now claims to be in by apt language in its policy. However, we know of no good reason why it could not have given a bond to the extent of its liability under the policy, as was done in the case of Tucker v. State Automobile Mut. Ins. Co., 280 Ky. 212, 132 S. W. (2d) 935.

We find force in the following statement of the beneficial plaintiff: "We cannot help but feel that it would be sophistry, in its most exaggerated form, for any court to hold, on the one hand, that, conceding that, if the judgment creditor had that amount of assets due him in any other form whatever, such assets would, unquestionably, be subject to garnishment, nevertheless, on the other hand, an insurance company, paid a full and sufficient consideration to assume just such a risk in just such a contingency, will be immune from the necessity of putting up any stay of execution or supersedeas bond, whatever, as must be done by all other litigants, except municipal or governmental agencies, and thus, by judicial process, set up a sort of special exclusion from the ordinary processes of the law to which all other litigants, both individual and corporate, are duly subject." We may add: The sheriff's return to the execution shows that he could find no property of the judgment debtor upon which a levy might be made; the garnishee defendant states in its brief that the judgment debtor was unable to furnish an appeal bond, and certain answers to certain interrogatories show that the garnishee defendant is conducting this appeal. That it is vitally interested in the appeal is obvious. Why should it not furnish a bond to the extent of its liability?

It is conceded that there was no issue of fact to be tried upon the interrogatories and the answers thereto.

appeal, an insurance company is not obliged to engage in the insurance business. As to the guarantee of defendant voluntarily issued the policy in question and it could have protected itself against the predicament that it now claims to be in by apt language in its policy. However, we know of no good reason why it could not have given a bond to the extent of its liability under the policy, as was done in the case of Taylor v. State, 120 Ky. 280, 122 S.W. 2d 937.

It is the force in the following statement of the defendant's plaintiff: "We cannot help but feel that it would be satisfactory in its most exaggerated form, for any court to hold, on the one hand, that, conceding that, if the judgment creditor had that amount of assets due him in any other form whatever, such assets would, unquestionably, be subject to garnishment, nevertheless, on the other hand, an insurance company, paid a full and sufficient consideration to assume that risk in fact such a company, will be immune from the necessity of paying us any sum of money, or any other assets, whatever, as must be done by all other litigants, except municipal or governmental agencies, and thus, by judicial process, set up a sort of special exclusion from the ordinary processes of the law to which all other litigants, both individual and corporate, are fully subject." In any event, the sheriff's return to the execution shows that he could find no property of the defendant upon which a levy might be made. The court has declined to state in its order that the judgment debtor was unable to furnish an appeal bond, and certain answers to certain interrogatories show that the defendant's defendant is contesting this appeal. That it is vitally interested in the appeal is obvious. Why should it not furnish a bond to the extent of its liability?

It is concluded that there was no issue of fact to be tried upon the interrogatories and the answers thereto.

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The judgment of the Circuit court of Cook county is reversed and the cause is remanded with directions to the trial court to enter a judgment for \$10,000 with interest in favor of Mary Jankowski, Administratrix of the Estate of Frank Jankowski, Deceased, for the use of Clyde Hollaris, a minor, by Albert Hollaris, Guardian, and against General Accident Fire and Life Assurance Corporation, Ltd., defendant garnishee.

cap.
cap.
IT JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS TO TRIAL COURT TO ENTER A JUDGMENT FOR \$10,000 WITH INTEREST IN FAVOR OF MARY JANKOWSKI, ADMINISTRATRIX OF THE ESTATE OF FRANK JANKOWSKI, DECEASED, FOR USE OF CLYDE HOLLARIS, A MINOR, BY ALBERT HOLLARIS, GUARDIAN, AND AGAINST GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., DEFENDANT GARNISHEE.

cap.
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ital.
Sullivan and Friend, JJ., concur.

-10-

The judgment of the Circuit Court of Cook County is reversed and the case is remanded with directions to the trial court to enter a judgment for \$10,000 with interest in favor of Mary Janowski, Administratrix of the Estate of Frank Janowski, Deceased, for the use of Clyde Janowski, a minor, by Albert Melnick, Guardian, and against General Accident Fire and Life Assurance Corporation, Ltd., Defendant at Garyshank.

RECEIVED MAY 10 1934
 THE OFFICE OF THE CLERK OF THE COURT
 IN THE CIRCUIT COURT OF COOK COUNTY
 IN A SUIT BETWEEN
 FRANK JANOWSKI, DECEASED
 BY HIS ADMINISTRATRIX
 MARY JANOWSKI
 AND
 GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.
 DEFENDANT

Sullivan and Friend, 13, corner.

41504

MARY JANKOWSKI, Administratrix
of the Estate of FRANK JANKOWSKI,
Deceased, for use of CLYDE HOL-
LARIIS, a Minor, by ALBERT HOL-
LARIIS, Guardian,

Appellant,

v.

GENERAL ACCIDENT FIRE & LIFE
ASSURANCE CORP., LTD., Garnishee,
Appellee.

26a
IN GARNISHMENT

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

315 I.A. 208

OPINION ON PETITION FOR REMEARING.

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Clyde Hollaris, a minor, by Albert Hollaris, Guardian, recovered a judgment for \$20,000 against Mary Jankowski, Administratrix of the Estate of Frank Jankowski, deceased, for damages for personal injuries sustained by the minor due to the alleged negligent operation of a motor truck owned by Frank Jankowski, deceased. No appeal bond was filed by the judgment debtor nor by the instant garnishee defendant, and execution issued on the judgment was returned nulla bona. After the appeal had been perfected in this court from the judgment entered in the original action the instant garnishment proceeding was commenced. The defendant garnishee, General Accident Fire & Life Assurance Corporation, Ltd., had entered into a contract of insurance with the judgment debtor, deceased, by the terms of which the garnishee defendant carried a public liability insurance policy in the amount of \$10,000 upon the truck of the judgment debtor involved in the accident. After answers had been filed by the garnishee defendant the beneficial plaintiff moved for judgment pro tanto against the garnishee defendant upon its sworn answers. The trial court entered an order denying the motion and discharging the garnishee defendant. The beneficial plaintiff appeals.

The defense of the garnishee defendant is that the garnishment

41504

WILLIAM J. HANCOCK, Administrator of the estate of FRANK JANKOWSKI, deceased, for use of CLYDE HOLLARIS, a minor, by ALBERT HELLARIS, Guardian.

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO., LTD., Defendant, Appellee.

PETITION FOR REHEARING

MR. PRESIDING JUSTICE JOSEPH R. BILLYARD THE OPINION OF THE COURT.

Clyde Hollaris, a minor, by Albert Hellaris, Guardian,

recovered a judgment for \$25,000 against very Jankowski, Administrator of the estate of Frank Jankowski, deceased, for damages for personal injuries sustained by the minor due to the negligent operation of a motor truck owned by Frank Jankowski, deceased. An appeal bond was filed by the judgment debtor nor by the instant garnishes defendant, and execution issued on the judgment was returned nulla bona. After the appeal had been set off in this court from the judgment entered in the original action the instant garnishment proceeding was commenced. The defendant garnished General Accident Fire & Life Assurance Corporation, Ltd., had entered into a contract of insurance with the judgment debtor, deceased, by the terms of which the garnished defendant carried a public liability insurance policy in the amount of \$10,000 upon the truck of the judgment debtor involved in the accident. After answers had been filed by the garnishes defendant the beneficial plaintiff moved for judgment and decree against the garnished defendant upon its second answers. The trial court entered an order denying the motion and discharging the garnishes defendant. The beneficial plaintiff appeals.

The defense of the garnishes defendant is that the judgment

proceedings were prematurely brought because there was an appeal from the judgment in the original suit then pending in this court and, therefore, "under the terms of the policy there was no final determination by judgment as required by the policy."

We filed an opinion reversing the judgment of the Circuit court of Cook county and remanding the cause with directions to the trial court to enter a judgment for \$10,000 with interest in favor of Mary Jankowski, Administratrix of the Estate of Frank Jankowski, Deceased, for the use of Clyde Hollaris, a minor, by Albert Hollaris, Guardian, and against General Accident Fire and Life Assurance Corporation, Ltd., defendant garnishee. The garnishee defendant filed a petition for rehearing, which petition we granted. We have this dayfiled an opinion in the original suit (Clyde Hollaris, a minor, by Albert Hollaris, Guardian v. Mary Jankowski, Administratrix of the Estate of Frank Jankowski, Deceased, and Alex Phal, Gen. No. 41529) in which we reversed the judgment of the Circuit court of Cook county in said original suit and remanded the cause for a new trial. As the judgment in that case was the sole basis for the garnishment proceedings the judgment of the Circuit court of Cook county in the instant proceedings discharging the garnishee defendant is affirmed.

JUDGMENT DISCHARGING GARNISHEE
DEFENDANT AFFIRMED.

Sullivan and Friend, JJ., concur.

proceedings were prematurely brought because there was an appeal from the judgment in the original suit then pending in this court and, therefore, "under the terms of the policy there was no final determination by judgment as required by the policy."

The court filed an opinion reversing the judgment of the Circuit

court of Cook county and remanding the cause with directions to the trial court to enter a judgment for \$10,000 with interest in

favor of Mary Janowski, Administratrix of the Estate of Frank

Janowski, Deceased, for the use of Clyde Hollaris, a minor, by

Albert Hollaris, Guardian, and against General Accident Fire and

Life Assurance Corporation, Ltd., defendant garnishee. The

garnishee defendant filed a petition for rehearing, which petition we granted. We have this day filed an opinion in the original suit

(Clyde Hollaris, a minor, by Albert Hollaris, Guardian v. Mary

Janowski, Administratrix of the Estate of Frank Janowski,

Deceased, and Alex Piel, Gen. No. 41529) in which we reversed the judgment of the Circuit court of Cook county in said original suit

and remanded the cause for a new trial. As the judgment in that

case was the sole basis for the garnishment proceedings the judgment of the Circuit court of Cook county in the instant proceedings

discharging the garnishee defendant is affirmed.

JUDITH M. CHICKING GARNISHEE
D. J. JAMES, JR., CLERK

Sullivan and Strand, Jr., counsel.

41702

PEOPLE OF THE STATE OF ILLINOIS
on the relation of IRVING BIELFELDT,
PAUL KASDORF, BEN WEIR, KEITH MOREY,
A. R. SCHULTZ, PATRICK McDONALD,
CLIFF WEISS, ELMER DRABEN, WILLIAM
REICHERT and GEORGE PHILIP,
Appellees,

v.

JOSEPH GANNON, as Mayor of the City
of Chicago Heights, a Municipal
Corporation; JOHN N. GANSEN, JR.;
MAURINO RICCHIUTO; JOHN F. JOHNSON;
EDWARD A. BARWIG, as Members of the
City Council of the City of Chicago
Heights; ARNO W. TOLLE, City Clerk
of the City of Chicago Heights;
WILLIAM E. LENNERTZ, as City Treasur-
er of the City of Chicago Heights,
and CITY OF CHICAGO HEIGHTS, a
Municipal Corporation,
Appellants.

270
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

315 I.A. 208³

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Relators, policemen and firemen of the City of Chicago Heights, a municipal corporation, filed a mandamus suit against that city and its officers to compel payment of the difference between the wages relators had received from July 1, 1937, to April 15, 1939, and the amounts which the Policemen's and Firemen's Minimum Wage Acts (Ill. Rev. Stat. 1937, chap. 24, pars. 360a, et seq.) direct to be paid. One of the defenses interposed by respondents in their answer questioned the constitutionality of the two Acts. Relators' motion for judgment on the pleadings was sustained, a writ of mandamus was issued requiring respondents within thirty days to perform all acts necessary to enable relators to collect and receive the amount of \$1,555.26 for the period from May 1, 1938, to April 15, 1939, and respondents were commanded to appropriate in the 1940-1941 appropriation ordinance the sum of \$1,920.04 for the payment of the balance of the salaries due relators for the period from July 1, 1937, to April 30, 1938, with costs. Respondents appealed directly to the Supreme court on the theory that constitutional questions were involved, and that court (People v. Gannon, 375 Ill. 504) held that

PROSECUTORS OF THE STATE OF ILLINOIS
vs.
THE CITY OF CHICAGO, PATRICK MC DONALD,
A. R. ROBERTS, JAMES GRANT, WILLIAM
RICHTER and GEORGE KELLY,
Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

JOSEPH CANTON, as Mayor of the City
of Chicago Heights, a Municipal
Corporation; JOHN W. GIBBS, JR.,
MAYORINO RICHTER; JOHN W. JOHNSON;
EDWARD A. BARRIS, as members of the
City Council of the City of Chicago
Heights; ARNO W. TOLL, City Clerk
of the City of Chicago Heights;
WILLIAM L. RICHTER, as City Treas-
urer of the City of Chicago Heights,
and CITY OF CHICAGO HEIGHTS, a
Municipal Corporation,
Appellants.

MR. PRESIDING JUSTICE ROBERTSON delivered the opinion of the court.
Relators, policemen and firemen of the City of Chicago Heights, a
municipal corporation, filed a mandamus suit against that city and
its officers to compel payment of the difference between the wages
relators had received from July 1, 1937, to April 15, 1939, and the
amounts which the Police Men's and Firemen's Minimum Wage Acts (Ill.
Rev. Stat. 1937, chap. 24, pars. 860a, 860b, 860c) direct to be paid.
One of the defenses interposed by respondents in their answer ques-
tioned the constitutionality of the two Acts. Relators' motion for
judgment on the pleadings was sustained, a writ of mandamus was
issued requiring respondents within thirty days to perform all acts
necessary to enable relators to collect and receive the amount of
\$1,557.26 for the period from July 1, 1938, to April 15, 1939, and
respondents were commanded to appropriate in the 1940-1941 appropria-
tion ordinance the sum of \$1,926.04 for the payment of the balance
of the salaries due relators for the period from July 1, 1937, to
April 30, 1938, with costs. Respondents appealed directly to the
Supreme Court on the theory that constitutional questions were in-
volved, and that court (People v. Gibson, 372 Ill. 504) held that

in People v. City of Springfield, 370 Ill. 541, it had passed upon the constitutionality of said Acts and had held them constitutional, and the cause was transferred to this court.

The petition for mandamus alleges that relators are citizens and residents of the City of Chicago Heights; that said city is duly organized under the Cities and Villages Act with all the powers provided thereby and the amendments thereto; that respondents are Mayor, members of the City Council, City Clerk and City Treasurer of said city; that on July 1, 1937, there were in force in the City of Chicago Heights ordinances of the city creating the police and fire departments; that from July 1, 1937, to July 21, 1939, there were in force in Illinois the so-called Policemen's and Firemen's Minimum Wage Acts (Ill. Rev. Stat. 1937, chap. 24, pars. 860a, et seq.), which provide a minimum salary of \$150 per month for members of regularly constituted police and fire departments of cities of between 10,000 and 25,000 population; that on July 1, 1937, the City of Chicago Heights had such a population and was subject to the provisions of said Acts; that relators were members of the regularly constituted police and fire departments of said city from July 1, 1937, to April 15, 1939, and as such were entitled to receive a minimum of \$150 per month during said period; that the amount appropriated by the City Council of said city in the appropriation ordinance for the fiscal year beginning May 1, 1937, and ending April 30, 1938, was insufficient to pay patrolmen and firemen \$150 per month for the whole of said fiscal year; that, notwithstanding the passage of said Minimum Wage Acts on July 1, 1937, respondents failed to increase relators' wages to \$150 per month commencing July 1, 1937, but continued to pay them the lesser amount specified in said appropriation ordinance for the 1937-1938 fiscal year, so that there was due relators for the period from July 1, 1937, to April 30, 1938, a total balance of \$1920.04; that for the fiscal year beginning May 1, 1938, and ending

In People v. City of Chicago, 276 Ill. 541, it was held upon the constitutionality of said acts and held them constitutional, and the cause was transferred to this court.

The petition for mandamus alleges that relators are citizens and residents of the City of Chicago; that said city is duly organized under the Cities and Villages Act with all the powers provided thereby and the amendments thereto; that relators are Mayor, members of the City Council, City Clerk and City Treasurer of said city; that on July 1, 1937, there were in force in the City of Chicago certain ordinances of the city providing the police and fire departments; that from July 1, 1937, to July 1, 1938, there were in force in Illinois the so-called "Police and Firemen's Minimum Wage Acts" (Ill. Rev. Stat. 1937, ch. 24, para. 80a, et seq.) which provide a minimum salary of \$150 per month for members of regularly constituted police and fire departments of cities of between 10,000 and 25,000 population; that on July 1, 1937, the City of Chicago had such a population and was subject to the provisions of said acts; that relators were members of the regularly constituted police and fire departments of said city from July 1, 1937, to April 15, 1938, and as such were entitled to receive a minimum of \$150 per month during said period; that the amount appropriated by the City Council of said city in the appropriation ordinance for the fiscal year beginning May 1, 1937, and ending April 30, 1938, was insufficient to pay between and between \$150 per month for the whole of said fiscal year; that, notwithstanding the passage of said Minimum Wage Acts on July 1, 1937, respondents failed to increase relators' wages to \$150 per month commencing July 1, 1937, but continued to pay them the lesser amount specified in said appropriation ordinance for the 1937-1938 fiscal year, so that there was due relators for the period from July 1, 1937, to April 30, 1938, a total balance of \$120.04; that for the fiscal year beginning May 1, 1938, and ending

April 30, 1939, said City Council appropriated a sufficient amount to pay patrolmen and firemen the minimum of \$150 per month, but that respondents paid relators a lesser sum per month, so that there was due relators for the period from May 1, 1938, to April 15, 1939, a total balance of \$1,555.26; that there is sufficient money in the treasury of said city to pay relators the balance due them in accordance with the said Acts. The petition prays for a writ of mandamus directing respondents to perform all acts necessary to enable relators to receive their rightful salaries in accordance with said Acts for the period from July 1, 1937, to April 15, 1939.

Thereafter the petition was amended by adding an allegation that in order to comply with the State laws respondents should appropriate in the annual appropriation ordinance for the fiscal year commencing May 1, 1940, and ending April 30, 1941, sufficient moneys to enable the city to pay relators a minimum salary of \$150 per month for the period from July 1, 1937, to April 30, 1938. By this amendment there was also added to the prayer for relief a further prayer that the writ of mandamus command respondents to appropriate in the 1940-1941 appropriation ordinance a sufficient amount to pay relators a minimum salary of \$150 per month for said period.

The answer of respondents to the petition and amendment thereto alleges "that the City of Chicago Heights is organized under the Cities and Villages Act with the powers set out in paragraph 2, and further alleges that in April of 1921 said city adopted and, since such time, has operated under the Commission Form of Municipal Government Act (Ill. Rev. Stat. 1939, ch. 24, sec. 265);" further alleges that the Minimum Wage Acts are unconstitutional, and that said Acts were amended by an act filed July 21, 1939, which provides that the same should become inoperative unless adopted by referendum, and that the same had not been adopted in Chicago Heights; admits said city's population on July 1, 1937, was between 10,000 and 25,000, but denies

April 30, 1939, said City Council appropriated a sufficient amount to pay patrolmen and firemen the minimum of \$150 per month, but that respondents paid ratelors a lesser sum per month, so that there was due ratelors for the period from July 1, 1937, to April 15, 1939, a total balance of \$1,757.26; that there is sufficient money in the treasury of said city to pay ratelors the balance due them in accordance with the said Acts, the petition prays for a writ of mandamus directing respondents to perform all acts necessary to enable ratelors to receive their rightful salaries in accordance with said Acts for the period from July 1, 1937, to April 15, 1939.

Thereafter the petition was amended by adding an allegation that in order to comply with the State laws respondents should appropriate in the annual appropriation ordinance for the fiscal year commencing May 1, 1940, and ending April 30, 1941, sufficient moneys to enable the city to pay ratelors a minimum salary of \$150 per month for the period from July 1, 1937, to April 30, 1938. By this amendment there was also added to the prayer for relief a further prayer that the writ of mandamus command respondents to appropriate in the 1940-1941 appropriation ordinance a sufficient amount to pay ratelors a minimum salary of \$150 per month for said period.

The answer of respondents to the petition and amendment thereto alleges "that the City of Chicago Heights is organized under the Cities and Villages Act with the powers set out in paragraph 2, and further alleges that in April of 1941 said city adopted and, since such time, has operated under the Commission Form of Municipal Government set (Ill. Rev. Stat. 1939, ch. 24, sec. 100);" further alleges that the minimum salary is unconstitutional, and that said Acts were amended by an act filed July 21, 1939, which provides that the same should become operative unless adopted by referendum, and that the same had not been adopted in Chicago Heights; that said city's population on July 1, 1937, was between 10,000 and 25,000, but denies

that said city was subject to the provisions of said Minimum Wage Acts; admits relators were members of the police and fire departments of said city from July 1, 1937, to April 15, 1939, but deny they were entitled to \$150 per month; admits that the statute (Ill. Rev. Stat. 1939, chap. 24, sec. 101) provides that no further appropriations than those made in the annual appropriation ordinance shall be made within the fiscal year unless first sanctioned by referendum; alleges that by statute (Ill. Rev. Stat. 1939, chap. 24, sec. 305) it is made a misdemeanor to expend a greater amount for any municipal purpose than the amount appropriated for such purpose in the annual appropriation ordinance for that fiscal year; avers that the 1937-1938 appropriation ordinance was passed June 21, 1937; admits that from July 1, 1937, to April 30, 1938, relators received less than \$150 per month, and received the amount specified in said 1937-1938 appropriation ordinance, which were the only salaries to which relators were entitled and which could have been lawfully paid them during said period, and denies there is any balance due relators for salary during said period; admits that the said 1938-1939 appropriation ordinance appropriated a sufficient amount to pay relators \$150 per month, and that a lesser monthly sum was paid them from May 1, 1938, to April 15, 1939, but alleges that such lesser monthly sum was the salary fixed by ordinance duly passed on August 1, 1938, which salaries so fixed were the only salaries to which relators were entitled, and denies there is any balance due relators for salary during the period from May 1, 1938, to April 15, 1939; denies that the Council should be required to appropriate any further sums for relators' benefit; admits there is money in the city treasury and alleges that such money is not sufficient to meet the current needs of the city, and denies that any of the relators is entitled to the relief prayed in the petition, as amended, or any part thereof, or to any other relief. The answer then alleges that

that said city was subject to the provisions of said Act. Acts; admits relators were members of the police and fire departments of said city from July 1, 1937, to April 15, 1938, but says they were entitled to \$150 per month; admits that the statute (Ill. Rev. Stat. 1937, chap. 24, sec. 101) provides that no further appropriations than those made in the annual appropriation ordinance shall be made within the fiscal year unless first sanctioned by referendum; alleges that by statute (Ill. Rev. Stat. 1937, chap. 24, sec. 305) it is made a misdemeanor to expend a greater amount for any municipal purpose than the amount appropriated for such purpose in the annual appropriation ordinance for that fiscal year; avers that the 1937-1938 appropriation ordinance as passed June 21, 1937, admits that from July 1, 1937, to April 15, 1938, relators received less than \$150 per month, and received the amount specified in said 1937-1938 appropriation ordinance, which were the only salaries to which relators were entitled and which could have been lawfully paid them during said period, and denies there is any balance due relators for salary during said period; admits that the said 1937-1938 appropriation ordinance appropriated a sufficient amount to pay relators \$150 per month, and that a lesser monthly sum was paid them from May 1, 1938, to April 15, 1939, but alleges that such lesser monthly sum was the salary fixed by ordinance duly passed on August 1, 1938, which salaries so fixed were the only salaries to which relators were entitled, and denies there is any balance due relators for salary during the period from May 1, 1938, to April 15, 1939; denies that the Council should be required to appropriate any further sums for relators' benefit; admits there is money in the city treasury and alleges that such money is not sufficient to meet the current needs of the city, and that any of the relators is entitled to the relief prayed in the petition, as awarded, or any part thereof, or to any other relief. The answer then alleges that

the financial condition of the City of Chicago Heights is such that respondents could not carry out any order as prayed for, and detailed tables and schedules of the assessed valuation of all taxable property in the city for the years 1937, 1938, 1939 and 1940 and of the outstanding debts and obligations of the city, not including accrued interest, on April 30, 1937, April 30, 1938, April 30, 1939, and February 29, 1940, showing that at all times since July 1, 1937, unto the present time, the City of Chicago Heights has been and is indebted beyond its statutory as well as its constitutional limitation as to debts. It is further alleged that the balance of \$15,505.73 in the Corporate Fund on March 1, 1940, would not be sufficient to meet payrolls and expenditures for the balance of the current fiscal year; that the average yearly revenue for general corporate purposes was \$210,000, while the necessary expenditures therefor for each of the fiscal years ending April 30, 1938, and April 30, 1939, was slightly more than \$220,000; that there had been an increase in judgments since April 30, 1939, of \$30,268; and that there will be a deficit of at least \$10,000 for the fiscal year ending April 30, 1940, not considering the alleged claims of relators or the said increase in judgments. For a further defense the answer alleged relators have been guilty of such laches as bars their alleged claims, and, in support thereof, the following undisputed facts are alleged: That relators knew immediately after enactment of the Minimum Wage Acts that the City Council had not appropriated sufficient moneys to pay relators and others similarly employed \$150 per month for the fiscal year ending April 30, 1938; that in August of 1937 relators and others similarly employed were informed that, because of its financial condition, the city could not pay such minimum salary, and that the city would decrease the personnel of the police and fire departments if any demand for such minimum salary were made; that, thereupon, relators

the financial condition of the City of Chicago. It is noted that respondents could not carry out any other as required for, and detailed tables and schedules of the assessed valuation of all taxable property in the city for the years 1937, 1938, 1939 and 1940 and of the outstanding debts and obligations of the city, not including accrued interest, on April 30, 1937, April 30, 1938, April 30, 1939, and February 29, 1940, showing what at all times since July 1, 1937, unto the present time, the City of Chicago has been and is indebted beyond its statutory as well as its constitutional limitation as to debts. It is further alleged that the balance of \$15,205.73 in the Corporate Fund on March 1, 1940, would not be sufficient to meet payrolls and expenditures for the balance of the current fiscal year; that the average yearly revenue for general corporate purposes was \$210,000, while the necessary expenditures therefor for each of the fiscal years ending April 30, 1938, and April 30, 1939, was slightly over such \$220,000; that there had been an increase in judgments since April 30, 1939, of \$3,200; and that there will be a deficit of at least \$1,000 for the fiscal year ending April 30, 1940, not considering the alleged claims of vendors or the said increase in judgments. For a further detail that these alleged vendors have been guilty of such lapses as have their alleged claims, and, in support thereof, the following undisputed facts are alleged: That vendors have immediately after completion of the contract agreed to that the City Council had not appropriated sufficient moneys to pay vendors and others similarly employed \$150 per month for the fiscal year ending April 30, 1938; that in August of 1937 vendors and others similarly employed were informed that, because of its financial condition, the city could not pay such minimum salary, and that the city would decrease the personnel of the police and fire departments if any demand for such minimum salary were made; that, consequently, vendors

and such others released and waived in writing any right or demand for such minimum salary; and that thereafter relators acquiesced in the appropriation made, and from July 1, 1937, to April 30, 1938, received and accepted semi-monthly portions of the amount appropriated; that relators knew on May 1, 1938, and after the passage of the ordinance of August 1, 1938, fixing the salaries which were paid for the period from May 1, 1938, to April 15, 1939, that the city's financial condition was such that the city could not and would not pay relators and others similarly employed \$150 per month during the fiscal year ending April 30, 1939, and that, if demand for such minimum wage had been made, the personnel of the police and fire departments would necessarily have been decreased; and that, nevertheless, relators acquiesced in the salaries fixed in the said ordinance, and from May 1, 1938, to April 15, 1939, received and accepted semi-monthly portions of the salary fixed by said ordinance; that no demand was ever made by any of the relators for the amount now claimed, or any part thereof, except by the filing of the petition herein on February 19, 1940; that, if the city is compelled to meet the demands of relators, fairness requires that it pay others who were similarly employed during the period in question the same amounts, which would total more than \$13,500; and that, by reason of the foregoing, the issuance of any writ of mandamus in this case would cause confusion, disorder and hardship.

When the Supreme court disposed of the constitutional question raised by respondents, the latter should, in our judgment, have abandoned this appeal, as the other points raised are without merit. In People v. City of Springfield, supra, the court held (p. 547): "The manifest purpose of the act in controversy is to insure reasonable living conditions to firemen in municipalities having a population between 10,000 and 150,000. For the reasons above set out, it is obvious that such purpose is directly connected

and such others released and relieved in fitting and proper manner for each minimum salary; and that thereafter the salary schedule in the appropriation made, and from July 1, 1937, to April 30, 1938, received and accepted semi-monthly portions of the amount appropriated; that relations knew on May 1, 1938, and after the passage of the ordinance of August 1, 1938, fixing the salaries which were paid for the period from May 1, 1938, to April 30, 1939, that the city's financial condition was such that the city could not and would not pay relations and others similarly employed \$150 per month during the fiscal year ending April 30, 1939, and that if demand for such minimum wage had been made, the personnel of the police and fire departments would necessarily have been increased; and that, nevertheless, relations acquiesced in the salaries fixed in the said ordinance, and from May 1, 1939, to April 30, 1940, received and accepted semi-monthly portions of the salary fixed by said ordinance; that no demand was ever made by any of the relations for the amount now claimed, or any part thereof, except by the filing of the petition herein on February 12, 1940; that at the city is compelled to meet the demands of relations, fairness requires that it pay others who were similarly employed during the period in question the same amounts, which would total more than \$13,500; and that, by reason of the foregoing, the issuance of any writ of habeas corpus in this case would cause confusion, disorder and hardship.

When the Supreme Court disposed of the constitutional question raised by respondents, the latter should, in our judgment, have abandoned this appeal, as the other points raised are without merit. In People v. City of Philadelphia, 309 Pa. 127, 17 A.2d 847, the court held (p. 847):

"The manifest purpose of the act in controversy is to insure reasonable living conditions to firemen in Philadelphia having a population between 10,000 and 150,000. For the reasons above set out, it is obvious that such purpose is directly connected

with and is a part of the general welfare." The opinion further states that there is a hazard connected with the work of policemen and firemen, and the Legislature has declared it to be a part of the public policy of this State that policemen and firemen receive adequate compensation for their services, commensurate with the hazards of their employment, because otherwise few men would seek that avenue of employment for a livelihood. In considering the following contentions of respondents it must be remembered that the Acts impose a duty upon the City to pay the minimum wage fixed by the Acts.

Respondents contend that the writ should not have issued because petitioners were guilty of laches and the City of Chicago Heights was seriously prejudiced thereby. The Firemen's and Policemen's Minimum Wage Acts were passed on July 1, 1937. It is a matter of common knowledge that many municipalities disputed the constitutionality of the Acts, and a suit was brought by the firemen of the City of Springfield to compel the officers of that city to comply with the Act (People v. City of Springfield, supra). While that case was pending in the Supreme court, City of Chicago Heights, respondent, passed, on June 20, 1938, its appropriation ordinance for the fiscal year commencing May 1, 1938, and ending April 30, 1939, in which ordinance the salaries of the policemen and firemen were fixed at \$150 per month in accordance with the Minimum Wage Acts, but respondents did not pay policemen and firemen the amount appropriated by the ordinance and arbitrarily paid the policemen \$139.64 and the firemen \$131.24. Relators contend, advisedly, we think, that they were justified in not complaining of the said actions of the City until the Supreme court had passed upon the constitutionality of the Acts. Relators brought their suit on February 19, 1940. The contention of respondents that the City was prejudiced by relators' failure to bring suit sooner

is without the slightest merit. It was commendable on the part of relators to wait until the Supreme court decided the case of People v. City of Springfield, supra, and respondents were not prejudiced thereby. Moreover, the Acts impose a duty upon the City to pay the minimum wage fixed by the Acts, and the City cannot evade that duty. Respondents contend that the writ orders them to do an act which they have no authority to perform and which would be unlawful. It is sufficient to say in answer to this contention that the mandamus order in the instant case merely orders respondents to perform acts that they are absolutely required to perform under the Acts, and which they have had ample time to perform. As heretofore stated, respondents, for the fiscal year commencing May 1, 1938, and ending April 30, 1939, appropriated sufficient money to pay the policemen and firemen in accordance with the Acts, and as to that money they will not be heard to say that they have used it for other purposes.

Respondents complain that the trial court erred in not granting a supersedeas without bond. There is force in the contention of relators that the trial court was justified in assuming, from the conduct of respondents, that it was a case where he should deny a supersedeas without bond. However, the question involved in the instant contention has become moot, as Mr. Justice Wilson, of the Supreme court, granted respondents a supersedeas without bond after the record was filed in that court.

If the City of Chicago Heights intends to maintain a police department and a fire department it must obey the mandatory provisions of the Acts in question.

The mandamus order of the Circuit court of Cook county is affirmed.

MANDAMUS ORDER AFFIRMED.

Sullivan and Friend, JJ., concur.

is without the slightest merit. It was contended on the part of
 relators to wait until the Supreme Court decided the case of City of
v. City of, and respondents were not prejudiced
 thereby. Moreover, the acts impose a duty upon the City to pay the
 minimum wage fixed by the acts, and the City cannot evade that duty.
 Respondents contend that the writ orders them to do an act which they
 have no authority to perform and which would be unlawful. It is
 sufficient to say in answer to this contention that the City of
 order in the instant case merely orders respondents to perform acts
 that they are absolutely required to perform under the acts, and which
 they have had ample time to perform. As heretofore stated, respond-
 ents, for the fiscal year commencing May 1, 1930, and ending April
 30, 1930, appropriated sufficient money to pay the policemen and fire-
 men in accordance with the acts, and as to that money they will not
 be hard to say that they have used it for other purposes.
 Respondents complain that the trial court erred in not granting
 a supersedeas without bond. There is force in the contention of re-
 lators that the trial court was justified in refusing, from the con-
 duct of respondents, that it was a case where as should deny a super-
 sedes without bond. However, the question involved in the instant
 contention has become moot, as the use of the writ of the
 court, granted respondents a supersedeas without bond after the
 record was filed in that court.
 In the City of Chicago, rights infants to maintain a police
 department and a fire department is most obviously a mandatory provi-
 sions of the acts in question.
 The mandamus order of the Circuit Court of Cook County is
 affirmed.

ALLIANCE BETWEEN RELATORS.

Sullivan and Friend, JJ., concur.

41806

THE TRUST COMPANY OF CHICAGO,
as Administrator of the Estates
of Steven M. Cermak, deceased,
and Richard S. Cermak, deceased,
(Plaintiff) Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, a corporation, and THE
ALTON RAILROAD COMPANY, a cor-
poration,
Defendants.

THE ALTON RAILROAD COMPANY,
(Defendant) Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

315 L.A. 209

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator of the estates of Steven M. Cermak, deceased, and Richard S. Cermak, deceased, sued The Baltimore and Ohio Railroad Company, a corporation, and The Alton Railroad Company, a corporation, charging negligence in the operation of a train at a crossing intersection, the alleged negligence resulting in the death of Steven M. Cermak and Richard S. Cermak. The case was tried before the court with a jury. At the close of plaintiff's case plaintiff dismissed the suit as to The Baltimore and Ohio Railroad Company. At the close of all of the evidence the trial court directed the jury to find a verdict for the defendant as to the case of plaintiff as administrator of the estate of Steven M. Cermak. The jury returned a verdict in favor of plaintiff as administrator of the estate of Richard S. Cermak, deceased, in the amount of \$6,000. Defendant appeals from a judgment entered upon the verdict.

The accident happened on February 22, 1938, about 9:30 a.m., at the intersection of the Alton Railroad Company's track and Illinois Highway 113, which is about two miles south of Wilmington, Illinois. At this point the Alton track runs in a northeasterly and southwesterly direction. Parallel to the track and immediately adjacent to it on

THE TRUST COMPANY OF CHICAGO
as Administrator of the Estate
of Steven M. Germa, deceased,
and Richard S. Cermak, deceased
(Plaintiffs) Appellants

v.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, a corporation, and THE
ALTON RAILROAD COMPANY, a cor-
poration,
Defendants.

THE ALTON RAILROAD COMPANY,
(Defendant) Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator of the estate of Steven M.

Germa, deceased, and Richard S. Cermak, deceased, sued the Balti-
more and Ohio Railroad Company, a corporation, and The Alton Rail-
road Company, a corporation, charging negligence in the operation

of a train at a crossing intersection, the alleged negligence
resulting in the death of Steven M. Germa and Richard S. Cermak.
The case was tried before the court with a jury. At the close of
plaintiff's case plaintiff dismissed the suit as to the Baltimore
and Ohio Railroad Company. At the close of all of the evidence

the trial court directed the jury to find a verdict for the

defendant as to the case of plaintiff as administrator of the

estate of Steven M. Germa. The jury returned a verdict in favor
of plaintiff as administrator of the estate of Richard S. Cermak,
deceased, in the amount of \$6,000. Defendant appeals from a judg-

ment entered upon the verdict.

The accident happened on February 22, 1911, about 9:30 a.m.,

at the intersection of the Alton Railroad Company's track and Illinois
Highway 113, which is about two miles south of Alton, Illinois.

At this point the Alton track runs in a northerly and westerly
direction. Parallel to the track and immediately adjacent to it on

the east is Illinois Highway 66. Highway 113 commences at Highway 66 and extends westerly over the Alton track. That track runs in a straight line for miles, and to the north, the direction from which the train in question came, a train can be seen approaching for a number of miles over a flat prairie in the open country. There are no trees or buildings between Highway 66 and the Alton track. Immediately preceding the accident Steven M. Cermak was driving a truck in a southerly direction on Highway 66. He used the truck in his trucking business. Richard, the eleven-year-old son of Steven, was riding in the seat with him and to his right. As the Cermak truck proceeded on Highway 66 it passed, about a thousand feet north of Highway 113, a small truck that was being driven southward by Floyd Lichtenwalter. The Cermak truck then passed a cattle truck that was being driven southward on Highway 66. As the elder Cermak reached Highway 113 he turned west on that highway. His truck was then four hundred or five hundred feet ahead of the Lichtenwalter truck, which was proceeding at a speed of about twenty-five miles an hour. The crossing is raised several feet above the level of the road and there are no obstructions at the place of the crossing. The evidence shows that as the Cermak truck turned into Highway 113 it slowed up. One of plaintiff's witnesses testified that as the truck went toward the railroad track it came almost to a stop before crossing. Coming south at that time and approaching the crossing was the "Ann Rutledge," a fast, streamlined train of the Alton Railroad Company, that was proceeding at a speed of sixty to seventy-five miles per hour. At this intersection there were the usual cross-buck signs, but no flasher lights or gates. "A very small proportion of the traffic that uses Highway 66 takes this crossing." The Cermak truck got onto the Alton track about the time the train reached that point and the front part of the truck was hit by the left front side of the locomotive. The truck was thrown a

the east is Illinois Highway 66. Highway 113 commences at Highway 66 and extends westerly over the Union track. The track runs in a straight line for miles, and to the north, the direction from which the train in question came, a train can be seen approaching for a number of miles over a flat prairie in the open country. There are no trees or buildings between Highway 66 and the Union track. Immediately preceding the accident Steven W. Gerk was driving a truck in a southerly direction on Highway 66. He used the truck in his trucking business. Richard, the eleven-year-old son of Steven, was riding in the seat with him and to his right. As the Gerk truck proceeded on Highway 66 it passed, about a thousand feet north of Highway 113, a small truck that was being driven southward by Floyd Johnston. After the Gerk truck then passed a cattle truck that was being driven southward on Highway 66. As the elder Gerk reached Highway 113 he turned west on that highway. His truck was then four hundred or five hundred feet ahead of the Johnston truck, which was proceeding at a speed of about twenty-five miles an hour. The crossing is raised several feet above the level of the road and there are no obstructions at the place of the crossing. The evidence shows that as the Gerk truck turned into Highway 113 it slowed up. One of plaintiff's witnesses testified that as the truck went toward the railroad track it came almost to a stop before crossing. Coming south at that time and approaching the crossing was the "Ann Rabel", a fast, streamlined train of the Union Railroad Company, that was proceeding at a speed of sixty to seventy-five miles per hour. At this intersection there were the usual cross-buck signs, but no flashing lights or gates. "A very small proportion of the traffic that uses Highway 66 takes this crossing." The Gerk truck got onto the Union track about the time the train reached that point and the front part of the truck was hit by the left front side of the locomotive. The truck was thrown a

considerable distance, and the elder Cermak and his son were killed as a result of the impact.

No complaint is made by counsel for plaintiff as to the action of the trial court in directing a verdict for defendant as to the claim of the administrator of the estate of the father; in fact, the administrator abandoned the claim as to the father. It appears to us that the elder Cermak, in attempting to cross the track at the time and place in question and under the circumstances that confronted him, was guilty of a very reckless act. He was thirty-four years of age and in splendid health. "His eyesight was perfect and so was his hearing." He lived not far from the place in question. But the negligence of the father cannot be imputed to the boy.

The major contention of defendant is that the manifest weight of the evidence shows that the negligence of the father was the sole proximate cause of the death of the boy. Plaintiff contends that defendant at the time in question propelled and operated the train across the crossing without blowing a whistle and that defendant was therefore guilty of negligence that proximately contributed to the injury even if the elder Cermak was guilty of contributory negligence. Whether or not a whistle was blown was the major issue of fact in the trial of the case. Defendant strenuously contends that the overwhelming evidence shows that a whistle was sounded for the crossing. Upon this question plaintiff introduced two witnesses, Floyd Lichtenwalter and his wife. In the Lichtenwalter truck Lichtenwalter, the lady who afterward became his wife, and the latter's two small children were seated in the front seat. Lichtenwalter was sitting on the left side of the seat; the lady on the right side. The window of the truck on the left side was open all the way and on the right side the window was down about three or four inches. Lichtenwalter and his wife both testified

considerable distance, and the older woman and her son were

killed as a result of the impact.

No complaint was made by counsel for plaintiff as to the

action of the trial court in directing a verdict for defendant as

to the claim of the administrator of the estate of the father; in

fact, the administrator abandoned the claim as to the father. It

appears to us that the elder woman, in attempting to cross the

track at the time and place in question and under the circumstances

that confronted him, was guilty of a very reckless act. He was

thirty-four years of age and in splendid health. "His eyesight was

perfect and so was his hearing." He lived not far from the place

in question. But the negligence of the father cannot be imputed

to the boy.

The major contention of defendant is that the manifest weight

of the evidence shows that the negligence of the father was the sole

proximate cause of the death of the boy. Plaintiff contends that

defendant at the time in question provoked and operated the train

across the crossing without blowing a whistle and that defendant was

therefore guilty of negligence that proximately contributed to the

injury even if the elder woman was guilty of contributory negli-

gence. Whether or not a whistle was blown was the major issue of

fact in the trial of the case. Defendant strenuously contends that

the overwhelming evidence shows that a whistle was sounded for the

crossing. Upon this question plaintiff introduced two witnesses,

Floyd Lichtenwalter and his wife. In the Lichtenwalter track

Lichtenwalter, the lady who afterward became his wife, and the

latter's two small children were seated in the front seat.

Lichtenwalter was sitting on the left side of the seat; the lady

on the right side. The window of the truck on the left side was

open all the way and on the right side the window was open about

three or four inches. Lichtenwalter and his wife both testified

that there was no whistle blown. Lichtenwalter also testified that until the Cermak truck turned into Highway 113 he did not see nor hear the train. For defendant, the engineer of the train and seven other witnesses gave testimony that supported defendant's contention that a whistle was blown. Counsel for plaintiff argues that most of that testimony should be rejected as false testimony. Counsel characterizes defendant's testimony as "utterly false" and "deliberately false." A careful study of defendant's evidence upon the point in question satisfies us that we would not be justified in rejecting that evidence upon the ground urged by plaintiff's counsel. We will always support a jury's verdict upon a question of fact if we can reasonably do so, but in the present case, after a painstaking consideration of all of the evidence that bears upon the question as to whether there was a whistle blown, we have been forced to the conclusion that the instant contention of defendant that the manifest weight of the evidence that a whistle was blown as the train approached the crossing and that the negligence of the father was the sole proximate cause of the death of the boy, is a meritorious one. As the case may be tried again we refrain from commenting upon the evidence in detail.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan and Friend, JJ., concur.

that there was no whistle blown. Subsequently it was testified that until the Greek truck turned into Highway 11, he did not see nor hear the train. For defendant, the opinion of the train and seven other witnesses gave testimony that supported defendant's contention that a whistle was blown. Counsel for plaintiff argues that most of that testimony should be rejected as false testimony. Counsel

characterizes defendant's testimony as "vitally false" and

"deliberately false." A careful study of defendant's evidence

upon the point in question satisfies us that we would not be justified in rejecting that evidence upon the ground urged by plaintiff's counsel. We will always support a jury's verdict upon a question of

fact if we can reasonably do so, but in the present case, after a painstaking consideration of all of the evidence that bears upon the

question as to whether there was a whistle blown, we have been forced to the conclusion that the instant contention of defendant that the

manifest weight of the evidence that a whistle was blown as the train approached the crossing and that the negligence of the latter was

the sole proximate cause of the death of the boy, is a speculative one. As the case may be tried again we refrain from commenting upon the evidence in detail.

The judgment of the Circuit Court of Cook County is reversed

and the case is remanded for a new trial.

JUDGMENT REVERSED AND CASE
REMANDED FOR A NEW TRIAL.

Sullivan and Friend, JJ., concur.

41817

JOHN JEFFERS SHAW,
Appellee,

v.

NATIONAL LIFE COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

315 I.A. 210¹

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action upon a contract of insurance issued by defendant to plaintiff, wherein the latter seeks judgment for certain old age settlement benefits that are provided for in a rider attached to the policy of insurance. Upon plaintiff's motion for summary judgment, judgment was entered for him and against defendant in the sum of \$1,600. Defendant appeals.

Plaintiff's statement of claim alleges:

"(1) On the 31st of December, 1909 the defendant the National Life Association, now known as the National Life Company, a corporation, issued its policy of insurance No. 17543 in the amount of \$2000.00 to John Jeffers Shaw, the assured herein,

"(2) That the said John Jeffers Shaw accepted the same policy when same was duly delivered to him, and paid the premium therefor, to May 29th, 1931, and for a long time after that date.

"(3) That the said policy contains the following provisions,
"OLD AGE SETTLEMENT. - In the event of the insured attaining the age of seventy years while this policy is in full force and effect * * * one-tenth of the face amount of this policy will be due and payable on the anniversary of said age until the entire amount of said policy has been paid'

"(4) That on December 31st, 1931 the assured had reached the age of seventy years, and demanded the payment of said policy according to its terms.

"(5) That \$200.00 was due to this plaintiff on December 31st 1931 and \$200.00 on each and every anniversary since that date, or ten payments amounting to \$2000.00 and a further sum for the

TOOK TESTS SINCE
Appellee
v.
NATIONAL LIFE COMPANY,
a corporation,
Appellant.

COURT OF CHICAGO

MR. PRESIDING JUDGE ROBERTS DELIVERED THE OPINION OF THE COURT.
This is an action upon a contract of insurance issued by
defendant to plaintiff, wherein the latter seeks judgment for
certain old age settlement benefits that are provided for in a
rider attached to the policy of insurance. Upon plaintiff's
motion for summary judgment, judgment was entered for him and
against defendant in the sum of \$1,600. Defendant appeals.

Plaintiff's statement of claim alleges:

- "(1) On the 31st of December, 1901 the defendant the
National Life Association, now known as the National Life Company,
a corporation, issued its policy of insurance no. 17543 in the
amount of \$2000.00 to John J. Shaw, the assured herein.
"(2) That the said John J. Shaw accepted the same
policy when same was duly delivered to him, and paid the premium
therefor, to wit \$25.00, on the 1st day of January, 1902.
"(3) That the said policy contains the following provisions:
"'OLD AGE SETTLEMENT. - In the event of the insured attaining the
age of seventy years while this policy is in full force and effect
*** one-tenth of the face amount of this policy will be due and
payable on the anniversary of said age until the entire amount of
said policy has been paid."
"(4) That on December 31st, 1931 the assured had reached
the age of seventy years, and demanded the payment of said policy
according to its terms.
"(5) That \$200.00 was due to said plaintiff on December
31st 1931 and \$200.00 on each and every anniversary since that date,
or ten payments amounting to \$2000.00 and a further sum for the

refund of the premiums paid after December 31st, 1931 which premiums amount to more than \$264.60.

"To the damage of the plaintiff of Two Thousand Two Hundred Sixty Four Dollars and Sixty Cents and accruals thereon."

By agreement, plaintiff was given leave to file a bill of particulars and the following bill of particulars was filed:

"(1) OLD AGE SETTLEMENT.- In the event of the insured attaining the age of seventy years, while this policy is in full force and effect, then permanent total disability shall be deemed to exist and if the insured shall so elect, one-tenth of the face of this Policy will be due and payable at each anniversary of said age until the entire amount has been paid. Any payments made on this policy by the Association shall be deducted from the face of the policy on final settlement. Should death intervene the remaining annual installments shall be completed to the beneficiary named in this Policy. The regular annual premiums under old age settlement shall be paid the Association during the installment paying period.

"(2) Demand was made by the insured on the insurer January 26th 1933."

Upon motion of defendant, paragraph (5) of the statement of claim was stricken. Defendant filed the following statement of defense:

"Defence

"The defendant says that

"1. The defendant admits the allegations contained in paragraphs 1 and 2 of the Plaintiff's Statement of Claim.

"2. Defendant further answering says that the policy herein sued upon contained a provision for Old Age Settlement as more fully set out in the Bill of Particulars filed by the plaintiff; that under said provision before Old Age Settlement becomes due or payable, the insured must elect to take same after attaining the age of 70 years; that under the provision in question at such time

return of the premium paid after December 31st, 1931 which amounted to more than \$64.50.

"To the damage of the plaintiff of two thousand two hundred

sixty four dollars and sixty cents and certain persons."

By agreement, plaintiff was given leave to file a bill of

particulars and the following bill of particulars was filed:

"(1) OLD AGE SETTLEMENT. -- In the event of the insured attaining the age of seventy years, while this policy is in full force and effect, then permanent total disability shall be deemed to exist and if the insured shall so elect, one-tenth of the face of this policy will be due and payable at each anniversary of said age until the entire amount has been paid. Any payments made on this policy by the Association shall be deducted from the face of the policy on final settlement. Should death intervene the remaining annual installments shall be completed to the beneficiary named in this policy. The regular annual premiums under this settlement shall be paid the Association during the installment paying period. (2) Demand was made by the insured on the Insurer January 26th 1933."

Upon motion of defendant, paragraph (2) of the statement of claim was stricken. Defendant filed the following statement of

defense:

"Defense

"The defendant says that

"1. The defendant admits the allegations contained in paragraphs 1 and 2 of the Plaintiff's statement of claim.

"2. Defendant further answering says that the policy herein sued upon contained a provision for Old Age Settlement as more fully set out in the Bill of Particulars filed by the plaintiff; that under said provision before Old Age Settlement became due or payable, the insured must elect to take same after attaining the age of 70 years; that under the provision in question at such time

after attaining age 70 that insured makes such an election, the installments to be paid under said provision would commence at the next birthday anniversary of the insured; that during the time the company would be required to pay said annual installments the insured would be obligated to pay premiums for the duration of said installment paying period.

"3. Defendant further states that the policy in question lapsed for non payment of premiums on July 1, 1940; that at no time while said policy was in full force and effect, or at any other time, has plaintiff requested, demanded or elected to take the Old Age Settlement installments as provided in said policy of insurance.

"By reason thereof defendant is not liable to the plaintiff in the sum of \$2264.60, or in any sum whatsoever."

Plaintiff then filed a motion for a summary judgment and filed the following affidavit in support of the same:

"John Jeffers Shaw being first duly sworn upon his oath deposes and states:

"(1) That he is the plaintiff in the above entitled action.

"(2) This is an action on a life insurance policy, an express contract, and the amount claimed and which is actually due, is the sum of Two Thousand Dollars with interest amount to Five Hundred Fifty Dollars a total of Two Thousand Five Hundred Fifty Dollars.

"(3) Deponent verily believes that there is no defense to the action and that the answer put in by the defendant is for the purpose of delay.

"(4) Deponent refers to the complaint, the bill of particulars and the exhibits for a more particular statement of the cause of action.

"(5) Deponent further says; that on the 31st day of December 1909 he received from the defendant, then known as the

after obtaining a No Mat Insured notice such an action, the
installments to be paid under said provision would become due at the
next birthday anniversary of the insured; that during the time the
company would be required to pay said annual installments the in-
sured would be obligated to pay premiums for the duration of said
installment paying period.

"3. Defendant further states that the policy in question
lapsed for non payment of premiums on July 1, 1940; that at no
time while said policy was in full force and effect, or at any other
time, has plaintiff requested, demanded or offered to take the Old
Age Settlement installments as provided in said policy of insurance.
"By reason thereof defendant is not liable to the plaintiff
in the sum of \$284.60, or in any sum whatsoever.

Plaintiff then filed a motion for a summary judgment and
filed the following affidavit in support of the same:
"John Jeffers Shaw being first duly sworn upon his oath

deposes and states:
"(1) That he is the plaintiff in the above entitled
action.

"(2) This is an action on a life insurance policy, an
express contract, and the amount claimed and which is actually
due, is the sum of Two Thousand Dollars with interest amount to
Five Hundred Fifty Dollars a total of Two Thousand Five Hundred
Fifty Dollars.

"(3) Dependent verily believes that there is no defense
to the action and that the answer put in by the defendant is for
the purpose of delay.

"(4) Dependent refers to the complaint, the bill of par-
ticulars and the exhibits for a more particular statement of the
cause of action.

"(5) Dependent further says; that on the 21st day of
December 1909 he received from the defendant, then known as the

National Life Association, a policy of insurance in the amount of Two Thousand Dollars, that said policy provided that (here follows the 'Old Age Settlement' provision in the rider).

"(b) That on the 26th day of January 1933 the insured elected to take the old age settlement payments, and send a request to the defendant to pay to him any moneys that may be collectable at time on the said policy; that in reply to this request the defendant by its agent notified the plaintiff as follows:

"February 2nd 1933

"Dear Mr. Shaw,

"We thank you for your remittance to cover the quarterly premium due January 1st on your policy No. 17543 and are enclosing formal receipt.

"This policy, Mr. Shaw, was written at a very low rate not sufficient to provide for surrender values of any kind; in fact, it represents pure life insurance without your paying anything extra for any special features. It would not be possible, therefore, for you to surrender the policy either for cash or paid up insurance as suggested in your letter of January 26th.

"We feel sure that on account of the low cost of this protection, you will want to make every effort possible to keep it in force.

"Yours truly,

"F. A. Shepard
"Assistant Secretary

"That after the letter as set out above was received by the plaintiff at no time did the defendant advise the plaintiff, who was then past the age of seventy years, that he could collect under the old age settlement clause of said policy, or did the defendant require the signing of any forms other than the letter received from the plaintiff for the benefits under the policy.

"That the plaintiff continued to pay the premiums on said policy until September 1940, and that there is now due the full

National Life Association, a policy of insurance in the amount of Two Thousand Dollars, that said policy provided that (here follows the 'old age settlement' provision in the rider).

"(b) That on the 26th day of January 1933 the insured elected to take the old age settlement payments, and send a request to the defendant to pay to him any moneys that may be collectable at time on the said policy; that in reply to this request the defendant by its agent notified the plaintiff as follows:
"February 2nd 1933

"Dear Mr. Shaw,

"We thank you for your remittance to cover the quarterly premium due January 1st on your policy No. 17543 and are enclosing formal receipt.

"This policy, Mr. Shaw, was written at a very low rate not sufficient to provide for surrender values of any kind; in fact, it represents pure life insurance without your paying anything extra for any special features. It would not be possible, therefore, for you to surrender the policy either for cash or paid up insurance as suggested in your letter of January 26th.

"We feel sure that on account of the low cost of this protection, you will want to make every effort possible to keep it in force.

"Yours truly,

"W. L. Shepard
"Assistant Secretary

"That after the letter as set out above was received by the plaintiff at no time did the defendant advise the plaintiff, who was then past the age of seventy years, that he could collect under the old age settlement clause of said policy, or did the defendant repudiate the signing of any forms other than the letter received from the plaintiff for the benefits under the policy.

"That the plaintiff continued to pay the premiums on said policy until September 1940, and that there is now due the full

amount of said policy.

"(6) Deponent further says that the sum of Two Thousand Dollars and interest a total of Two Thousand Five Hundred and Fifty Dollars is actually due and owing from the defendant to the plaintiff that no part of said amount has been paid.

"(7) Deponent therefore prays that an order may be made striking out the answer of the defendant and granting judgment in favor of the plaintiff for the sum of Two Thousand Five Hundred Fifty Dollars, with interest and costs."

Defendant then filed a motion to strike the affidavit for summary judgment for the following reasons:

"1) The affidavit is not based or predicated on the personal knowledge of the affiant.

"2) The affidavit fails to set forth with particularity the facts upon which the plaintiff's cause of action is based.

"3) The affidavit does not have attached thereto sworn or certified copies of all papers upon which the plaintiff relies.

"4) The affidavit consists of conclusions and does not contain a recitation of facts as would be admissible in evidence.

"5) Affidavit fails to affirmatively show that if the affiant was sworn as a witness, he could testify competently to the facts alleged in said affidavit.

"And for other reasons to be assigned at the time of set hearing."

The motion to strike was denied. Defendant then filed the following "affidavit of merits in defense to motion for summary judgment:"

"Ward J. Davidson, being first duly sworn on oath, deposes and says that he is Secretary of the National Life Company, defendant herein; that he has personal knowledge of the facts; that he is keeper of the books and records of the corporation and has charge of all files and correspondence; that on the 31st day of December,

amount of said policy.

"(6) Dependent further says that the sum of two thousand

Dollars and interest a total of two thousand five hundred and fifty Dollars is actually due and owing from the defendant to the plaintiff that no part of said amount has been paid.

"(7) Dependent therefore prays that an order may be made

striking out the answer of the defendant and granting judgment in favor of the plaintiff for the sum of two thousand five hundred

Fifty Dollars, with interest and costs."

Defendant then filed a motion to strike the affidavit for

summary judgment for the following reasons:

"(1) The affidavit is not based or predicated on the

personal knowledge of the affiant.

"(2) The affidavit fails to set forth with particularity

the facts upon which the plaintiff's cause of action is based.

"(3) The affidavit does not have attached thereto sworn

or certified copies of all papers upon which the plaintiff relies.

"(4) The affidavit consists of conclusions and does not

contain a recitation of facts as would be admissible in evidence.

"(5) Affidavit fails to affirmatively show that if the

affiant was sworn as a witness, he could testify competently to

the facts alleged in said affidavit.

"And for other reasons to be stated at the time of set

hearing."

The motion to strike was denied. Dependent then filed the

following "affidavit of merits in defense to motion for summary

judgment:"

"I, J. Davidson, being first duly sworn, depose and say

that I am Secretary of the National Life Company, defendant

herein; that I have personal knowledge of the facts; that I am

keeper of the books and records of the corporation and have charge

of all files and correspondence; that on the first day of December,

1909, the defendant, the National Life Association now known as the National Life Company, a corporation, issued its policy of insurance No. 17543 in the amount of \$2,000.00, to John Jeffers Shaw, plaintiff herein; that thereafter a Rider was forwarded to the insured to be affixed to the policy which rider contained a provision for Old Age Settlement as set out in plaintiff's affidavit for summary judgment; that the said rider was issued by the defendant without any extra premium being charged therefor; that the said policy of insurance was written at a rate insufficient to provide for cash or loan values, but represented pure life insurance without any terminal values or equities; that on the 26th day of January 1933, the defendant received a letter from the insured, a true and correct copy of said letter being attached hereto and marked Exhibit I; that a reply was made by the defendant to said communication on the 2nd day of February, 1933, a true and correct copy of reply to said letter being attached hereto and marked Exhibit 2; that there is attached hereto all the correspondence received by the defendant and all copies of replies made by the defendant to said communications, true and correct copies of said correspondence being attached hereto and marked Exhibits 3 to 7, both inclusive.

"That under the said provision pertaining to old age settlement the insured must elect to take same after attaining the age of 70 years; that said election is a condition precedent to the payment of old age settlement; that the said election must be made while the policy is in full force and effect; that under the provision in question that at such time after attaining age 70 the insured makes such an election, if the policy is in full force and effect, the installments to be paid under said provision will commence at the next birthday anniversary of the insured, and that during the time the old age settlement benefits would be paid the insured would be required to pay the premiums on said policy for the duration of the installment paying period.

"That the policy in question lapsed for non payment of

1909, the defendant, the National Life Association now known as the National Life Company, a corporation, issued its policy of insurance No. 17545 in the amount of \$2,000.00, to John Walters Shaw, Plaintiff herein; that thereafter a Rider was forwarded to the insured to be affixed to the policy which rider contained a provision for the Settlement as set out in Plaintiff's affidavit for summary judgment; that the said rider was issued by the defendant without any extra premium being charged therefor; that the said policy of insurance was written at a rate insufficient to provide for cash or loan values, but represented pure life insurance without any terminal value or equities; that on the 10th day of January 1933, the defendant received a letter from the insured, a true and correct copy of said letter being attached hereto and marked Exhibit I; that a reply was made by the defendant to said communication on the 10th day of February, 1933, a true and correct copy of reply to said letter being attached hereto and marked Exhibit 2; that there is attached hereto all the correspondence received by the defendant and all copies of replies made by the defendant to said communications, true and correct copies of said correspondence being attached hereto and marked Exhibits 3 to 7, both inclusive.

"That under the said provision pertaining to old age settlement the insured was not to take same after attaining the age of 70 years; that said election is a condition precedent to the payment of old age settlement; that the said election must be made while the policy is in full force and effect; that under the provision in question there is such time after attaining age 70 the insured makes such an election, if the policy is in full force and effect, the installment to be paid under said provision will commence at the next birthday anniversary of the insured, and that during the time the old age settlement herein fits would be paid the insured would be required to pay the premium on said policy for the duration of the installment period.

"That the policy in question issued for non-payment of

premium on July 1, 1940; that at no time while said policy was in full force and effect or at any other time has plaintiff requested, demanded or elected to take the old age settlement installments as provided in said rider attached to said policy herein sued upon."

Attached to the affidavit as exhibits are the communications between the parties, but only the following letter and the answer to it have any bearing upon this appeal:

"1-25-33

"Box 1394 Southern Pines N.C.

"To Nat'l Life Company
"Des Moines Ia

"Dear Sirs:

"Have you any proposition to offer on a paid up policy or cash surrender of present policy

"Very Truly Yours

"John Jeffers Shaw"

Defendant's answer to the foregoing letter, dated February 2, 1933, is also attached to the affidavit; a copy of the letter appears in plaintiff's affidavit for summary judgment.

In support of its contention that the trial court erred in entering judgment for plaintiff on his motion for summary judgment defendant contends "that the benefits in question are optional with the insured and in order to obtain them it required an election on his part after attaining age 70; that no demand, request or election was ever made by the insured to obtain these benefits during the time the contract of insurance was continued in force, nor at any other time; that the rider providing for old age settlement benefits was attached to the policy and was in the possession of the plaintiff for many years; that he knew or was presumed to know the contents thereof; that said benefits are not the equivalent of extended insurance, cash surrender, paid-up insurance, or other terminal values found in legal reserve policies of insurance now being issued,

premium on July 1, 1943; that at no time while said policy was in full force and effect or at any other time has plaintiff received, demanded or intended to take the old or new policy benefits as provided in said rider attached to said policy herein and upon. Attached to the affidavit as exhibits are the communications between the parties, but only the following letter and the answer to it have any bearing upon this appeal:

"1-25-33

"Box 1394 Northern Times N.C.

"The Nat'l Life Company
"Des Moines Ia

"Dear Sirs:

"Have you any proposition to offer on a paid up policy

or cash surrender of present policy

"Very Truly Yours

"John Jeffers Shaw"

Defendant's answer to the foregoing letter, dated February 2, 1933, is also attached to the affidavit; a copy of the letter appears in plaintiff's affidavit for summary judgment. In support of its contention that the trial court erred in entering judgment for plaintiff on its motion for summary judgment defendant contends "that the benefits in question are optional with the insured and in order to obtain them it required an election on his part after attaining age 70; that no demand, request or election was ever made by the insured to obtain these benefits during the time the contract of insurance was continued in force, nor at any other time; that the rider providing for old age settlement benefits was attached to the policy and was in the possession of the plaintiff for many years; that he knew or was presumed to know the contents thereof; that said benefits are not the equivalent of extended insurance, cash surrender, paid-up insurance, or other terminal values found in legal reserve policies of insurance now being issued;

the policy in question being issued by an assessment life insurance company not permitted by law to provide for paid up or cash surrender values; that the old age settlement benefits, if the insured elects to receive them, reduces the amount of insurance payable at death, and required the payment of premiums during the time said benefits were being paid; that the defendant did not mislead plaintiff as to his rights under the contract in question."

Plaintiff's counsel has filed a typewritten brief in which he states many abstract propositions of law but fails to show how the propositions apply to the facts set up in the pleadings and affidavits. He does not attempt to answer errors assigned by defendant and fails to inform us upon what grounds the summary judgment can be sustained. The main point urged is that the appeal should be dismissed because defendant failed to perfect its appeal in accordance with the requirements of chap. 110, par. 259.48 (4), Ill. Rev. Stat. 1941, which provides: "No judgment will be pronounced in any agreed case on appeal from the trial court placed upon the docket of the Supreme or Appellate Court unless an affidavit shall be filed setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy between the parties, and that the opinion of the reviewing court is not sought with any other purpose than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record." Plaintiff's counsel, in support of his claim that the appeal should be dismissed, insists that the instant case was submitted to the trial court upon an agreed statement of facts, and that defendant failed to file the affidavit required by the Statute. It is difficult to treat this motion seriously. The section of the statute upon which plaintiff's counsel relies applies to cases where the parties in any civil action in any court of record, may make an agreed case "containing the facts and points of law at issue between them, and file the same in such court; and the said agreed case, with

the policy in question being issued by an insurance company not permitted by law to provide for aid up or cash surrender values; that the old age settlement benefits, if the insured should to receive them, means the amount of insurance payable at death, and required the payment of premiums during the life said benefits were being paid; that the defendant did not mislead plaintiff as to his rights under the contract in question."

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the decision of the trial judge thereon, may be certified to the Supreme Court or to the Appellate Court by the clerk of such court, if the same is reviewable by the Supreme Court or the Appellate Court, without certifying any additional record in the case. Upon such agreed case being so certified and filed in the Supreme or Appellate Court, the case shall proceed in the same manner as if a full record on appeal had been certified to the Supreme or Appellate Court." (Par. 259.48 (1).) The summary judgment in the instant case was not based upon an agreement or stipulation as to the facts and the pleadings and affidavits show a sharp dispute upon material facts. Plaintiff next asserts that "the case having been submitted to the court on an agreed statement of facts all question of pleading was waived, and it was unnecessary to submit a question to the jury." No argument is submitted in support of this assertion.

Plaintiff's affidavit for summary judgment is to be strictly construed and the right to judgment must be free from doubt. Summary judgments should not be entered where the trial judge would have to decide controverted questions of fact. If the defense is "arguable," "apparent," or "made in good faith" it should be submitted to a jury. (See Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Barrett v. Shanks, 300 Ill. App. 119, 126; Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, 470.) To quote from the last mentioned case (pp. 470, 471):

"Defendant points out the rules which guide the courts. The procedure may not be used to impair right of trial by jury. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523. The purpose of the procedure is not to try an issue of fact as that term is used in law but rather to try whether there is an issue of fact between the parties within the legal meaning. The method is necessarily inquisitorial. The pleadings (important) are not controlling. If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded. If there is

the decision of the trial judge thereon, may be certified to the Supreme Court or to the Appellate Court by the clerk of said court, if the same is reviewable by the Supreme Court on the Appellate Court, without certifying any additional record in the case. Upon such agreed case being so certified and filed in the Supreme or Appellate Court, the case shall proceed in the same manner as if a full record on appeal had been certified to the Supreme or Appellate Court." (Part. 299.48 (1.)). The summary judgment in the instant case was not based upon an agreement or stipulation as to the facts and the pleadings and affidavits show a sharp dispute upon material facts. Plaintiff next asserts that "the case having been submitted to the court on an agreed statement of facts all question of pleading was waived, and it was unnecessary to submit a question to the jury." No argument is submitted in support of this assertion. Plaintiff's affidavit for summary judgment is to be strictly construed and the right to judgment must be free from doubt. Summary judgments should not be entered where the trial judge would have to decide controverted questions of fact. If the defense is "apparent," or "made in good faith" it should be submitted to a jury. (See Diversey Lithiating Corp. v. International Lithiating Corp., 300 Ill. 300, 111. 119, 126; Ill. v. International Lithiating Corp., 310 Ill. 310, 111. 119, 126; Ill. v. International Lithiating Corp., 310 Ill. 310, 111. 119, 126). To quote from the last mentioned case (pp. 470, 471): "Defendant points out the rules which guide the courts. The procedure may not be used to deprive a party of trial by jury. Diversey Lithiating Corp. v. International Lithiating Corp., 300 Ill. 300, 111. 119, 126. The purpose of the procedure is not to try an issue of fact or that term is used in law but rather to try whether there is an issue of fact between the parties within the legal meaning. The method is necessarily indispensable. The pleadings (important) are not controlling. If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded. If there is

a material issue of fact it must be submitted to a jury. In Berick v. Curran, 55 R. I. 193, 179 Atl. 708, 710, this procedure is well described as 'a two-edged weapon - useful if it precludes the interposition of defenses for delay, but dangerous if it deprives a defendant of the opportunity to have a trial of seriously contested questions of fact or law.'

"The authorities say affidavits for plaintiff should be construed strictly, those for defendants liberally. Shientag, 4 Fordham L. R. 186; Gleason v. Hoeke, 5 App. Dist. of Col. 1, 4-5; Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320; Wells v. Alropa Construction Corp., 82 Fed. (2d) 887, 889, are cited.

"Plaintiff's right to judgment should be free from doubt. Lord Esher in Sheppards & Co. v. Wilkinson & Jarvis, 6 T. L. R. 13, and many other cases.

"Even if defense papers are found insufficient, judgment should not be ordered unless plaintiff's affidavit (strictly construed) leaves no question of defendant's liability. People for use of Dyer v. Sanculius, 284 Ill. App. 463, 474-475; Weiss v. Goldberger, 209 App. Div. 615, 205 N. Y. S. 1, 3; 4 Fordham L. R. 186, 216; Wm. H. Frear & Co., Inc. v. Bailey, 127 Misc. 79, 214 N. Y. S. 675, 677.

"If the defense is 'arguable,' 'apparent,' made in 'good faith' it should be submitted to a jury. Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320. The court is bound to accept statement of facts as true when alleged in defendant's affidavits. The whole record must be considered."

In the instant case defendant had filed a request for a trial by jury. Its contention that the court erred in not submitting the case for trial on the material issues of fact involved and in entering judgment for plaintiff upon his motion for summary judgment is clearly a meritorious one. From the record we are unable to see upon what theory of fact or law the trial court entered the summary judgment, and counsel for plaintiff, in his brief, makes no real attempt to

justify the judgment. Plaintiff's suit is apparently based upon the theory that while the policy was still in full force and effect he made a demand on the insurer to pay him benefits provided for in the rider attached to the policy. The rider provides, inter alia: "OLD AGE SETTLEMENT. - In the event of the insured attaining the ^{seventy} age of ~~seventy~~ years, while this policy is in full force and effect, then permanent total disability shall be deemed to exist and if the insured shall so elect, one-tenth of the face of this Policy will be due and payable at each anniversary of said age until the entire amount has been paid." (Italics ours.) Defendant, in its statement of defense and in its affidavit of merits in defense to motion for summary judgment avers that the policy lapsed for non-payment of the premium on July 1, 1940; that at no time while said policy was in full force and effect or at any other time had plaintiff requested, demanded or elected to take the old age benefit installments as provided in the rider attached to the policy of insurance. It was necessary for plaintiff if he wished to obtain the benefits provided for in the rider that he make an election while the policy was still in full force and effect. (See Blume v. Pittsburg Life & Trust Co., 263 Ill. 160, 164.) Plaintiff, in his affidavit for summary judgment, did not specifically deny that the policy lapsed for non-payment of the premium on July 1, 1940. If we assume that plaintiff, in his statement of claim and in his affidavit for summary judgment, made out a prima facie case, it is clear that defendant raised issues of fact that bore directly upon plaintiff's right to recover, and it was a jury's function to decide the disputed issues of fact. The instant contentions of defendant must be sustained.

Defendant strenuously contends that under the pleadings, plaintiff's affidavit in support of the summary judgment and defendant's affidavit in opposition to the judgment plaintiff could not recover and therefore the judgment should be reversed without remanding the cause. While defendant's argument in

justify the judgment. Plaintiff's only basis for recovery is the theory that while the policy was still in full force and effect he made a demand on the insurer to pay him benefits payable for the rider attached to the policy. The rider provides, in pertinent part: "OLD AGE BENEFIT. - In the event of the insured attaining the age of ~~xxx~~ ^{seventy} years, while this policy is in full force and effect, then permanent total disability shall be deemed to exist and if the insured shall so elect, one-tenth of the face of this policy shall be due and payable at each anniversary of said age until the entire amount has been paid." (Italics ours.) Defendant, in its motion of defense and in its affidavit of merits in due time to wit: the summary judgment avers that the policy lapsed for non-payment of the premium on July 1, 1940; that it on that date a full policy was in full force and effect or at any other time and Plaintiff requested or elected to take the old age benefit installment as provided in the rider attached to the policy of insurance. It was necessary for Plaintiff if he wished to obtain the benefits provided for in the rider that he make an election while the policy was still in full force and effect. (See Shaw v. American Life Insurance Co., 263 Ill. App. 2d, 104.) Plaintiff, in his affidavit for summary judgment, did not specifically deny that the policy lapsed for non-payment of the premium on July 1, 1940. It is assumed that Plaintiff, in his statement of claim and in his affidavit for summary judgment, made out a prima facie case, it is clear that defendant raised the issue of fact that bore directly upon Plaintiff's right to recover, and it was a jury's function to decide the disputed issues of fact. The instant contentions of defendant must be sustained.

Defendant strenuously contends that under the provisions of Plaintiff's affidavit in support of its summary judgment and defendant's affidavit in opposition to the judgment Plaintiff could not recover and that for the judgment should be reversed without remanding the cause. While defendant's argument in

support of this contention is not without some force, we have reached the conclusion that justice will be best served by a remandment of the cause. Plaintiff was allowed to sue as a poor person. He was allowed to file a typewritten brief in this court and we are not satisfied that his case has been properly presented.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

support of this contention is not shown here, we have reached the conclusion that justice will be best served by a remandment of the cause. Plaintiff was allowed to set as a poor person. He was allowed to file a typewritten brief in this court and we are not satisfied that his case has been properly presented.

The judgment of the principal court of Chicago is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH THIS OPINION.

Sullivan and Friend, JJ., concur.

41865

EDWARD ZATOR,
Appellee,

v,

WALTER J. CUMMINGS and DANIEL
C. GREEN, as Receivers, etc.,
et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

300a
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

3151A. 210²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action to recover damages for injuries sustained when a north-bound automobile, driven by plaintiff on Damen avenue in Chicago, was struck by or collided with a street car. A jury returned a verdict in favor of plaintiff in the sum of \$1,850, upon which judgment was entered. Defendants appeal.

William Gnat, who was riding, as a guest, in the back seat of the automobile, also sued the defendants for injuries sustained in the accident. A jury returned a verdict in his favor for \$5,000. Defendants filed a motion for judgment notwithstanding the verdict, which the trial court allowed, and judgment was entered in favor of defendants. Gnat appealed, and the Third Division of this court reversed the judgment of the trial court and entered judgment in favor of plaintiff for \$5,000, with interest from the date of the verdict. (See Gnat v. Richardson, 311 Ill. App. 242.) The Supreme court allowed defendants' petition for an appeal and later filed an opinion (Gnat v. Richardson, 378 Ill. 626) affirming the judgment of the Appellate court.

The instant case was submitted to the jury upon three charges of negligence, namely, that the motorman turned the street car from Damen avenue into 14th street (a left turn) (1) without keeping a proper lookout, (2) without giving any warning, and (3) without giving the right of way to plaintiff. The sole contention raised by defendants upon this appeal is that the court should have directed

EDWARD ZATOR,
Appellee,

v.

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C. GRAY, as Receivers, etc.,
et al., doing business as
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Appellants.

OF COOK COUNTY.

APPEAL FROM CIRCUIT COURT

MR. PRESIDING JUDGE SCAMMAN DELIVERED THE OPINION OF THE COURT.

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The instant case was submitted to the jury upon three charges of negligence, namely, that the motorman turned the street car from Damen avenue into 14th street (a left turn) (1) without keeping a proper lookout, (2) without giving any warning, and (3) without giving the right of way to plaintiff. The sole contention raised by defendants upon this appeal is that the court should have directed

a verdict for defendants, or should have entered judgment for defendants notwithstanding the verdict as the case is devoid of any proof of due care on the part of plaintiff and therefore the judgment should be reversed without remanding.

"'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297.)' (Mahan v. Richardson, 284 Ill. App. 493, 495.)

"'The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, St. Louis and Pittsburg Railroad Co. v. Hutchinson, 120 Ill. 587; Austin v. Public Service Co., ante, p. 112 [299 Ill. 112].) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the

a verdict for defendants, or should have entered judgment for defendants notwithstanding the verdict as the case is devoid of any proof of due care on the part of plaintiff and therefore the judgment should be reversed without remanding.

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on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the

court of which complaint is made we do not weigh the evidence, we can look only at that which is favorable to appellant. Yes v.

Yes, 255 Ill. 414; McGuire v. Reynolds, 288 Ill. 198; Elmer v.

Rush, 273 Ill. 489." (Hunter v. Brown, 315 Ill. 293, 296, 297.)

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negligence on the part of the defendant or that there was such con-

tributory negligence on the part of the plaintiff as to defeat

recovery, we must be able to say that all reasonable minds must

agree that the defendant was not negligent in his acts or that the

injury was the result of plaintiff's own negligence.' (Petro v. Hines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, 322, 323.)

"Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 id. 630; O'Rourke v. Sproul, 241 id. 576.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Brophy v. Illinois Steel Co., 242 Ill. 55. City of Chicago v. Jarvis, 226 id. 614.) We cannot weigh the evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence, (Dukeman v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 237 Ill. 104,) and we cannot reject testimony as improbable unless it is contrary to some natural law. (Zetsche v. Chicago, Peoria and St. Louis Railway Co., 238 Ill. 240.)' (Ziraldo v. Lynch Co., 365 Ill. 197, 199, 200.)" (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110, 111. See, also, Murphy v. Illinois State Trust Co., 375 Ill. 310, 314; Gnat v. Richardson, 378 Ill. 626, 627, 628.)

Obedying the rules of law that govern us in passing upon the instant contention, we find the following evidence that tends to prove the allegation in plaintiff's declaration that he was in the exercise of due care and caution for his own safety at and before the time of the accident:

The accident happened about 11:55 p.m., Sunday, May 15, 1938, at the intersection of Damen avenue and 14th street. Damen avenue

at the intersection of Damen Avenue and 14th Street, Damen Avenue
The accident happened about 11:25 p.m., Sunday, May 15, 1938.
the time of the accident:
exercise of due care and caution for his own safety at and before
prove the allegation in plaintiff's declaration that he was in the
instant contention, we find the following evidence that tends to
Obeying the rules of law that govern us in passing upon the
Gust v. Richardson, 378 Ill. 626, 627, 628.)
See, also, Murphy v. Illinois State Trust Co., 375 Ill. 310, 314;
Thompson v. Chicago Motor Coach Co., 392 Ill. 104, 110, 111.
238 Ill. 240.)' (Strickland v. Lynch Co., 395 Ill. 197, 199, 200.)"
natural law. (Zetzsche v. Chicago, Berlin and St. Louis Railway Co.,
cannot reject testimony as improbable unless it is contrary to some
plaintiff, Chicago and St. Louis Railway Co., 237 Ill. 104,) and we
was guilty of contributory negligence, (Dukeman v. Cleveland, Cin-
the evidence to determine, as a matter of fact, whether the plaintiff
Ill. 55. City of Chicago v. Jarvis, 526 Id. 614.) We cannot weigh
have found for the plaintiff. (Brophy v. Illinois Steel Co., 245
which may legitimately be drawn therefrom, the jury might reasonably
alone and when considered to be true, together with the inference
law whether from the evidence in favor of the plaintiff, standing
verdict for the defendant preserves for review only a question of
Id. 630; O'Rourke v. Sprout, 241 Id. 576.) A motion to direct a
Thomas v. Buchanan, 357 Ill. 275; Waller v. Phelps, 232
minds would reach the conclusion that there was contributory negli-
is so clearly insufficient to establish due care that all reasonable
instructions. It becomes a question of law only when the evidence
is ordinarily a question of fact for the jury to decide under proper
"Whether a plaintiff was guilty of contributory negligence

Hotel Corp., 353 Ill. 312, 322, 323.)
Hines, 299 Ill. 236, 240. See, also, Holtz v. Broadway Central
Hotel Corp., 353 Ill. 312, 322, 323.)

injury was the result of plaintiff's own negligence." (Id.)

runs north and south and has two sets of street car tracks, one for the north-bound cars and the other for south-bound cars. The street is about thirty-eight feet wide from curb to curb. 14th street commences at Damen avenue and runs east. It is about thirty-eight feet wide from curb to curb and has two sets of street car tracks. West-bound 14th street cars turn north on Damen avenue and east-bound 14th street cars run south on Damen avenue to 14th street, where they turn east (a left turn). Damen avenue street cars go straight north or south on that avenue. On Damen avenue, commencing about seventy-two feet south of the north building line of 14th street, there is a subway that runs under the railroad tracks from that point southward about three blocks to 17th street. The motorman testified that in the course of his route he had to make a number of turns, but "this turn at 14th and Damen was the sharpest turn of them all, that is a very sharp turn." The switch on the Damen avenue car track where the 14th street cars turn east begins at the north building line of 14th street. The street level on Damen avenue at the intersection of 14th street is about three feet, four inches higher than it is at the viaduct, and therefore south-bound traffic on Damen avenue moves downgrade from the intersection of 14th street to the viaduct, while north-bound traffic from the viaduct to 14th street moves upgrade. The automobile was driven by plaintiff. William Gnat sat in the back seat, on the left-hand side. Plaintiff, when he reached the corner of Damen avenue and 21st street, went north on Damen avenue. As plaintiff approached 14th street his view to the east was entirely blocked by a concrete wall railroad embankment until the 14th street crossing was almost reached. Plaintiff testified that as he approached 14th street he was going "about twenty-eight miles an hour, no faster than thirty;" that his right wheel was just a little way over the east rail, "just straddling it;" that when he was about thirty feet south of the north end of the viaduct he first noticed a south-

turns north and south and has two sets of street car tracks, one for the north-bound cars and the other for south-bound cars. The street is about thirty-eight feet wide from curb to curb. 14th street commences at Damen avenue and runs east. It is about thirty-eight feet wide from curb to curb and has two sets of street car tracks. West-bound 14th street cars turn north on Damen avenue and east-bound 14th street cars turn south on Damen avenue to 14th street, where they turn east (a left turn). Damen avenue street cars go straight north or south on that avenue. On Damen avenue, commencing about seventy-two feet south of the north building line of 14th street, there is a subway that runs under the railroad tracks from that point southwest about three blocks to 17th street. The motorist testified that in the course of his route he had to make a number of turns, but "this turn at 14th and Damen was the sharpest turn of them all, that is a very sharp turn." The street on the Damen avenue car track where the 14th street car turn east begins at the north building line of 14th street. The street level on Damen avenue at the intersection of 14th street is about three feet, four inches higher than it is at the viaduct, and therefore south-bound traffic on Damen avenue moves downgrade from the intersection of 14th street to the viaduct, while north-bound traffic from the viaduct to 14th street moves upgrade. The automobile was driven by plaintiff. William Grant sat in the back seat, on the left-hand side. Plaintiff, when he reached the corner of Damen avenue and 14th street, went north on Damen avenue. As plaintiff approached 14th street his view to the east was entirely blocked by a concrete wall railroad embankment until the 14th street crossing was almost reached. Plaintiff testified that as he approached 14th street he was going "about twenty-eight miles an hour, no faster than thirty," that his right wheel was just a little way over the east rail, "just straddling it," that when he was about thirty feet south of the north end of the viaduct he first noticed a south-

bound street car on Damen avenue which was then just coming to the switch, which is approximately even with the north building line of 14th street; that the car was about two feet north of the switch at the time he first saw it; that he slowed down slightly as he approached the crossing; that when he was at the north end of the viaduct he looked to his right, but kept on going; that he then looked to his left and saw the street car swinging into him from the west side; that the street car was swinging east; that the car was then about five feet from him; that he stepped on the gas and turned to his right to avoid a collision, but the crash came; that the street car swung to the left fast. The motorman had been on that route for about twenty years. Plaintiff was familiar with the intersection. Plaintiff testified that before cars turned to the left it was the custom, "they usually sound the bell, or they stop to look, and let traffic go through first;" that the street car did not give any warning nor sound any bell that he heard; that the motorman did not do anything in the way of giving a warning. Gnat testified, inter alia, that he had lived in that immediate neighborhood all his life and was very familiar with the intersection; that "when they make that turn, they give some kind of a warning or ring the bell;" that he did not at any time prior to the collision hear a bell sounded. The motorman testified that after they reach the switch and receive a signal from the conductor to go ahead the motorman always "taps the gong," and "when we see anybody, we tap it hard;" that "the front part of the street car keeps on going forward and then when the trucks hit the switch, then the trucks turn around first, and then when they turn, then they get into the switch, then my front end swings around;" that "this turn at 14th and Damen was the sharpest turn of them all, that is a very sharp turn;" that the left front corner of the street car hit the automobile; that the car did not make any noise

bound street car on Damen avenue which was then just coming to the switch, which is approximately even with the north building line of 14th street; that the car was about two feet north of the switch at the time he first saw it; that he slowed down slightly as he approached the crossing; that when he was at the north end of the viaduct he looked to his right, out kept on going; that he then looked to his left and saw the street car swinging into him from the west side; that the street car was swinging east; that the car was then about five feet from him; that he stepped on the gas and turned to his right to avoid a collision, but the crash came; that the street car swung to the left fast. The motorman had been on that route for about twenty years. Plaintiff was familiar with the intersection. Plaintiff testified that before cars turned to the left it was the custom, "they usually sound the bell, or they stop to look, and let traffic go through first;" that the street car did not give any warning nor sound any bell that he heard; that the motorman did not do anything in the way of giving a warning. That testified, ~~after~~ after ~~also~~, that he had lived in that immediate neighborhood all his life and was very familiar with the intersection; that "when they make that turn, they give some kind of a warning or ring the bell;" that he did not at any time prior to the collision hear a bell sounded. The motorman testified that after they reach the switch and receive a signal from the conductor to go ahead the motorman always "taps the gong," and "when we see anybody, we tap it hard;" that "the front part of the street car keeps on going forward and then when the trucks hit the switch, then the trucks turn around first, and then when they turn, then they get into the switch, then my front end swings around;" that "this turn at 14th and Damen was the sharpest turn of them all, that is a very sharp turn;" that the left front corner of the street car hit the automobile; that the car did not make any noise

going around the corner; that he "could not hear the wheels at all on the rails." The motorman further testified that that trip was his last trip of that day. The distance between the north-bound and south-bound Damen avenue tracks is about six feet, five and one-half inches, and the body of the street car extends two feet beyond the rail. The front trucks are about seven and one-half feet back of the front end of the street car. The motorman testified that in making the turn, when the trucks hit the switch they turn first, then the front end of the car swings around. The street car weighed "around 30 tons, if not more," and was constructed of iron and steel. The motorman further testified that "you throw the switch when the street car is in motion."

In passing upon the question of carefulness or negligence of plaintiff the jury had a right to take into consideration the evidence as to the custom of defendants to sound a gong before making the left turn into 14th street and plaintiff's reliance thereon. In North Chicago St. R. R. Co. v. Irwin, 202 Ill. 345, the court said (p. 347): " * * * the court did not err in permitting the appellee to prove the existence of the custom of running all north-bound cars on the east track and all south-bound cars on the west track. The existence of this custom entered into the consideration of the question whether the motorman was in the exercise of ordinary care in propelling the car northwards on the west track at such a rate of speed as twelve or fifteen miles per hour, and also bore upon the question of the carefulness or negligence of the deceased in leaving the space between the tracks and going upon the west track in order to be out of danger from a car moving northward." (Italics ours.) This sound principle of law has been followed in numerous cases. To cite a few: see Sturm v. Consolidated Coal Co., 248 Ill. 20, 29; Gourley v. Chicago & E. I. Ry. Co., 295 Ill. App. 160, 176; Potter v. Chicago, Milwaukee & St. P. Ry. Co., 208 Ill.

going around the corner; that he "could not hear the wheels at all on the rails." The motorman further testified that that trip was his last trip of that day. The distance between the north-bound and south-bound Damen avenue tracks is about six feet, five and one-half inches, and the body of the street car extends two feet beyond the rail. The front trucks are about seven and one-half feet back of the front end of the street car. The motorman testified that in making the turn, when the trucks hit the switch they turn first, then the front end of the car swings around. The street car weighed "around 30 tons, if not more," and was constructed of iron and steel. The motorman further testified that "you throw the switch when the street car is in motion."

In passing upon the question of carelessness or negligence of plaintiff the jury had a right to take into consideration the evidence as to the custom of defendants to sound a long horn making the left turn into 14th street and plaintiff's reliance thereon. In North Chicago St. R. Co. v. Irving, 202 Ill. 345, the court said (p. 347): " * * the court did not err in permitting the appellee to prove the existence of the custom of running all north-bound cars on the east track and all south-bound cars on the west track. The existence of this custom entered into the consideration of the question whether the motorman was in the exercise of ordinary care in propelling the car northwards on the west track at such a rate of speed as twelve or fifteen miles per hour, and also bore upon the question of the carelessness or negligence of the defendant in leaving the space between the tracks to swing upon the west track in order to be out of danger from a car moving northward." (Italics ours.) This sound principle of law has been followed in numerous cases. To cite a few: see Irving v. North Chicago St. R. Co., 248 Ill. 20, 29; Conroy v. Chicago & N. W. Ry. Co., 295 Ill. 40, 160, 176; Potter v. Chicago & N. W. Ry. Co., 203 Ill.

App. 363, 372.

The question presented by the sole contention raised by defendants is: Is there any evidence in favor of plaintiff, which, standing alone and considered to be true, together with the inferences which may legitimately be drawn therefrom, from which a jury, acting reasonably, might have found that the plaintiff was in the exercise of due care at the time of and just prior to the accident? Unless we can say that all reasonable minds must agree that, tested by plaintiff's theory of fact, he was guilty of contributory negligence, then defendants' contention must fall.

As plaintiff approached 14th street his view to the east on that street was blocked by the railroad wall until the 14th street crossing was almost reached. It was necessary, therefore, for him to look out for possible west-bound traffic on 14th street. He had a right to rely upon the custom of the street cars to sound a bell before making the turn, especially as it was a left turn. Plaintiff's evidence was that the motorman did not sound a bell or give any warning before making the turn. As plaintiff approached the crossing the street car was coming south and was about two feet north of the switch. It appears that the switch is thrown while the street car is in motion. At the time of the collision the turn had only been partly made, as the motorman testified that the left front corner of the car struck plaintiff's automobile. When that corner of the car struck the automobile at the west rail of the north-bound Damen ^{avenue} track, it had traveled a distance of only five feet eastward. The trucks turn first, then the front end of the car swings around fast. In other words, for a very short period of time the front end of the car appears to be going forward even after the trucks have moved into the switch. From the time that the front end of the car commenced to swing to the east until the collision, not more than a second or two could have elapsed. It

App. 303, 372.

The question presented by the sole contention raised by defendants is: Is there any evidence in favor of plaintiff, which, standing alone and considered to be true, together with the inferences which may legitimately be drawn therefrom, from which a jury, acting reasonably, might have found that the plaintiff was in the exercise of due care at the time of and just prior to the accident? Unless we can say that all reasonable minds must agree that, tested by plaintiff's theory of fact, he was guilty of contributory negligence, then defendants' contention must fail.

As plaintiff approached 14th street his view to the east on that street was blocked by the railroad wall until the 14th street crossing was almost reached. It was necessary, therefore, for him to look out for possible west-bound traffic on 14th street. He had a right to rely upon the custom of the street cars to sound a bell before making the turn, especially as it was a left turn. Plaintiff's evidence was that the motorman did not sound a bell or give any warning before making the turn. As plaintiff approached the crossing the street car was coming south and was about two feet north of the switch. It appears that the switch is thrown while the street car is in motion. At the time of the collision the turn had only been partly made, as the motorman testified that the left front corner of the car struck plaintiff's automobile. Then that corner of the car struck the automobile at the west rail of the north-bound Damen ^{avenue} track. It had traveled a distance of only five feet eastward. The trucks turn first, then the front end of the car swings around last. In other words, for a very short period of time the front end of the car appears to be going forward even after the trucks have moved into the switch. From the time that the front end of the car commenced to swing to the west until the collision, not more than a second or two could have elapsed. If

was a very sharp turn. Plaintiff, when he saw the car swinging toward him, stepped on the gas and turned to his right in an effort to avoid the accident, but the crash came.

We hold that the contention of defendants that plaintiff was guilty of contributory negligence as a matter of law is without merit.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

was a very sharp turn. Plaintiff, when he saw the car swinging toward him, stepped on the gas and turned to his right in an effort to avoid the accident, but the crash came.

He held that the contention of defendants that Plaintiff was guilty of contributory negligence as a matter of law is without merit.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, Pl., counsel.

41903

WILLIAM H. McCAUSLAND and
ANTOINETTE McCAUSLAND,
Appellees,

v.

THE CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

31a
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

315 I.A. 211

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action to recover interest upon a judgment in a condemnation proceeding. The cause was heard by the court without a jury and judgment was entered in favor of William H. McCausland and Antoinette McCausland, plaintiffs, and against City of Chicago, a municipal corporation, defendant, in the sum of \$1,214.19. Defendant appeals.

The original complaint, filed by William H. McCausland, plaintiff, on March 6, 1934, alleges that on February 29, 1928, a judgment in a condemnation proceeding in the sum of \$8,214.60 was entered in favor of William H. McCausland and against defendant and that the judgment was paid on July 14, 1932, without interest. The complaint prays for a judgment for interest on the judgment for the period from February 29, 1928, to July 12, 1932, in the sum of \$1,793.39. Defendant filed an answer, the averments of which are not pertinent to the issues involved upon this appeal. On November 20, 1940, by leave of court, Antoinette McCausland was made an additional party plaintiff and an amended complaint was filed which names William H. McCausland and Antoinette McCausland, his wife, as plaintiffs. The amended complaint alleges that plaintiffs were the owners of certain property condemned by the City and that on July 30, 1929, a judgment for \$8,214.60 was entered in the condemnation proceedings in favor of William H. McCausland and Antoinette McCausland; that the judgment was paid without interest on July 14, 1932. The amended complaint prays for judgment for interest from July 30, 1929, to July 14, 1932,

App. 363, 372.

The question presented by the sole contention raised by

defendants is: Is there any evidence in favor of plaintiff,

which, standing alone and considered to be true, together with

the inferences which may legitimately be drawn therefrom, from

which a jury, acting reasonably, might have found that the plaintiff

was in the exercise of due care at the time of and just prior to

the accident? Unless we can say that all reasonable minds must

agree that, tested by plaintiff's theory of fact, he was guilty of

contributory negligence, then defendants' contention must fail.

As plaintiff approached 14th street his view to the east

on that street was blocked by the railroad wall until the 14th

street crossing was almost reached. It was necessary, therefore,

for him to look out for possible west-bound traffic on 14th street.

He had a right to rely upon the custom of the street cars to sound

a bell before making the turn, especially as it was a left turn.

Plaintiff's evidence was that the motorman did not sound a bell

or give any warning before making the turn. As plaintiff approached

the crossing the street car was coming south and was about two feet

north of the switch. It appears that the switch is thrown while

the street car is in motion. At the time of the collision the turn

had only been partly made, as the motorman testified that the left

front corner of the car struck plaintiff's automobile. When that

corner of the car struck the automobile at the west rail of the

evening

north-bound Damen track, it had traveled a distance of only five

feet eastward. The trucks turn first, then the front end of the

car swings around fast. In other words, for a very short period

of time the front end of the car appears to be going forward even

after the trucks have moved into the switch. From the time that

the front end of the car commenced to swing to the east until the

collision, not more than a second or two could have elapsed. If

was a very sharp turn. Plaintiff, when he saw the car swinging toward him, stepped on the gas and turned to his right in an effort to avoid the accident, but the crash came.

We hold that the contention of defendants that plaintiff was guilty of contributory negligence as a matter of law is without merit.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

was a very sharp turn. Plaintiff, when he saw the car swinging toward him, stepped on the gas and turned to his right in an effort to avoid the accident, but the crash came. We hold that the contention of defendant that plaintiff was guilty of contributory negligence as a matter of law is without merit.

The judgment of the Circuit Court of Cook County is

affirmed.

JUDGMENT AFFIRMED.

Sullivan and Tilden, Jr., counsel.

41903

WILLIAM H. McCAUSLAND and
ANTOINETTE McCAUSLAND,
Appellees.

v.

THE CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

31a
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

315 I.A. 211

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action to recover interest upon a judgment in a condemnation proceeding. The cause was heard by the court without a jury and judgment was entered in favor of William H. McCausland and Antoinette McCausland, plaintiffs, and against City of Chicago, a municipal corporation, defendant, in the sum of \$1,214.19. Defendant appeals.

The original complaint, filed by William H. McCausland, plaintiff, on March 6, 1934, alleges that on February 29, 1928, a judgment in a condemnation proceeding in the sum of \$8,214.60 was entered in favor of William H. McCausland and against defendant and that the judgment was paid on July 14, 1932, without interest. The complaint prays for a judgment for interest on the judgment for the period from February 29, 1928, to July 12, 1932, in the sum of \$1,793.39. Defendant filed an answer, the averments of which are not pertinent to the issues involved upon this appeal. On November 20, 1940, by leave of court, Antoinette McCausland was made an additional party plaintiff and an amended complaint was filed which names William H. McCausland and Antoinette McCausland, his wife, as plaintiffs. The amended complaint alleges that plaintiffs were the owners of certain property condemned by the City and that on July 30, 1929, a judgment for \$8,214.60 was entered in the condemnation proceedings in favor of William H. McCausland and Antoinette McCausland; that the judgment was paid without interest on July 14, 1932. The amended complaint prays for judgment for interest from July 30, 1929, to July 14, 1932,

WILLIAM H. MCGOWAN and
ANTONETTE MCGOWAN

CITY OF CHICAGO

v.
CITY OF CHICAGOMunicipal Corporation,
Defendant.

MR. PRESIDING JUDGE ROBERT D. BROWN, THE CLERK OF THE COURT.

This is an action to recover interest upon a judgment in

a condemnation proceeding. The case was heard by the court without

a jury and judgment was entered in favor of William H. McGowan

and Antonette McGowan, plaintiffs, and against City of Chicago,

a municipal corporation, defendant, in the sum of \$1,214.00. Deft-

ant appeals.

The original complaint, filed by William H. McGowan, plain-

tiff, on March 6, 1934, alleges that on February 29, 1928, a judg-

ment in a condemnation proceeding in the sum of \$8,214.00 was entered

in favor of William H. McGowan and against defendant and that the

judgment was paid on July 14, 1932, without interest. The complaint

prays for a judgment for interest on the judgment for the period from

February 29, 1928, to July 12, 1932, in the sum of \$1,793.30. Defend-

ant filed an answer, the averments of which are not pertinent to the

issues involved upon this appeal. On November 20, 1940, by leave of

court, Antonette McGowan was made an additional party plaintiff

and an amended complaint was filed which names William H. McGowan

and Antonette McGowan, his wife, as plaintiffs. The amended

complaint alleges that plaintiffs were the owners of certain property

condemned by the City and that on July 30, 1929, a judgment for

\$8,214.00 was entered in the condemnation proceedings in favor of

William H. McGowan and Antonette McGowan; that the judgment

was paid without interest on July 14, 1932. The amended complaint

prays for judgment for interest from July 30, 1929, to July 14, 1932,

for \$1,214.19 in favor of both plaintiffs. The answer filed by defendant to the amended complaint denies that the condemnation judgment was entered in favor of William H. McCausland and Antoinette McCausland, and states that it was entered in favor of the "owner or owners of or parties interested in the property above described." The answer alleges that if the City is liable for any interest on the award it is in no event liable for more than interest on that portion of the award represented by the claim of William H. McCausland and that the claim of Antoinette McCausland was barred by the Statute of Limitations because it had not accrued within five years before the filing of the amended complaint on November 20, 1940.

Defendant contends that (I) "The claims of William H. McCausland and Antoinette McCausland for interest created separate causes of action;" and (II) "The claim of Antoinette McCausland was barred by the Statute of Limitations and section 46 of the Civil Practice Act does not apply."

The situation in the instant case is the same as was present in the case of Charles H. Mann, as Assignee of Matthias H. Mann, and Annie A. Mann v. City of Chicago, Appellate Court Gen. No. 41854, and the points here raised are the same as were raised in that case. In the Mann case we have this day filed an opinion wherein we have set forth our reasons and conclusions touching the matters involved in that appeal, and for the reasons and conclusions stated in that opinion, the judgment order of the Superior court of Cook county in the instant case is reversed, and judgment is entered here in favor of William H. McCausland and against City of Chicago, a municipal corporation, defendant, in the sum of \$607.10; and as to the claim of Antoinette McCausland judgment is entered here in favor of City of Chicago, a municipal

for \$1,214.19 in favor of both plaintiffs. The answer filed by defendant to the amended complaint denies that the condemnation judgment was entered in favor of William H. McCasland and Antoinette McCasland, and states that it was entered in favor of the "owner or owners of or parties interested in the property above described." The answer alleges that if the City is liable for any interest on the award it is in no event liable for more than interest on that portion of the award represented by the claim of William H. McCasland and that the claim of Antoinette McCasland was barred by the statute of limitations because it had not occurred within five years before the filing of the amended complaint on November 20, 1940.

Defendant contends that (I) "The claims of William H. McCasland and Antoinette McCasland for interest created separate causes of action;" and (II) "The claim of Antoinette McCasland was barred by the statute of limitations and section 43 of the Civil Practice Act does not apply."

The situation in the instant case is the same as was present in the case of James L. Mann, as executor of the estate of H. Mann, and Annie A. Mann v. City of Chicago, Appellate Court Gen. No. 41874, and the points here raised are the same as were raised in that case. In the Mann case we have today filed an opinion wherein we have set forth our reasons and conclusions touching the matters involved in that appeal, and for the reasons and conclusions stated in that opinion, the judgment order of the superior court of Cook county in the instant case is reversed, and judgment is entered here in favor of William H. McCasland and Antoinette McCasland, a municipal corporation, defendant, in the sum of \$67.19; and as to the claim of William H. McCasland judgment is entered here in favor of City of Chicago, a municipal

-3-

corporation, defendant.

JUDGMENT ORDER REVERSED, AND
JUDGMENT HERE IN FAVOR OF
WILLIAM H. McCAUSLAND AND
AGAINST CITY OF CHICAGO, A
MUNICIPAL CORPORATION, DEFENDANT,
FOR \$607.10; AND AS TO CLAIM OF
ANTOINETTE McCAUSLAND JUDGMENT
ENTERED HERE IN FAVOR OF CITY
OF CHICAGO, A MUNICIPAL CORPORATION,
DEFENDANT.

Sullivan and Friend, JJ., concur.

corporation, defendant.

REPORT OF THE BOARD OF DIRECTORS
 AND
 WILLIAM J. MCCALLISTER AND
 ALBERT G. GILBERT, A
 REPORT OF THE BOARD OF DIRECTORS
 FOR 1907, AND IN THE CITY OF
 CHICAGO, A REPORT OF THE BOARD OF
 DIRECTORS.

William and Friends, 17, corner.

41954

JOSEPH LUMBER COMPANY,
a corporation,

Appellant,

v.

RONALD LAMBERT TREE et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

315 I.A. 212'

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed its complaint to enforce a mechanic's lien against certain premises owned by the Trustees of the Lambert Tree Estate. Plaintiff appeals from a ~~judgment~~ decree dismissing the complaint for want of equity.

The complaint alleges, inter alia, that plaintiff entered into an oral contract with Jens Pederson whereby it undertook to furnish lumber in the construction of a permanent improvement upon the premises in question; that as a subcontractor it furnished lumber to the value of \$290.95 to said Pederson, who had a written contract with one George Psiharis for the construction of permanent improvements upon the premises; that the said Trustees and George Psiharis authorized and directed Pederson to construct permanent improvements upon the premises and that Pederson constructed said permanent improvements and plaintiff furnished lumber in said construction with the knowledge, permission and consent of Psiharis and the said Trustees and that there is a balance due and owing to plaintiff for the delivery of the lumber of \$290.95, for which plaintiff claims a mechanic's lien upon the said land and improvements. The answer filed by defendants denies, inter alia, that the lumber furnished by plaintiff to the contractor was used by the contractor for any permanent improvements to the premises and alleges that any lumber which may have been furnished by plaintiff to said premises was used in improvements of a temporary nature

JOHN L. COMPANY,
a corporation,

v.

RONALD LAMBERT TRUST, et al.,
Debtors.

MR. PRESIDING JUDGE SCALIA DELIVERED THE OPINION OF THE COURT.
Plaintiff filed its complaint to enforce a mechanic's lien against certain premises owned by the Trustees of the Lambert Trust Estate. Plaintiff seeks from a ~~judgment~~ decree dismissing the complaint for want of equity.

The complaint alleges, inter alia, that Plaintiff entered into an oral contract with Jens Pederson whereby it undertook to furnish lumber in the construction of a permanent improvement upon the premises in question; that as a subcontractor it furnished lumber to the value of \$290.95 to said Pederson, who had a written contract with one George Baharia for the construction of permanent improvements upon the premises; that the said Pederson and George Baharia authorized and directed Pederson to construct permanent improvements upon the premises and that Pederson constructed said permanent improvements and Plaintiff furnished lumber in said construction with the knowledge, permission and consent of Baharia and the said Trustees and that there is a balance due and owing to Plaintiff for the delivery of the lumber of \$290.95, for which Plaintiff claims a mechanic's lien upon the said land and improvements. The answer filed by defendants denies, inter alia, that the lumber furnished by Plaintiff to the contractor was used by the contractor for any permanent improvements to the premises and alleges that any lumber which may have been furnished by Plaintiff to said premises was used in improvements of a temporary nature.

which did not increase the value of the premises and which were intended to be removed by the tenant at the termination of its lease.

The cause was referred to a master, who filed a report which found, inter alia: "Seventh: That the aforesaid lumber was used by Jens Pederson for the construction of said floors, walls and an office in the basement of the above described premises; that said flooring, walls and office became attached to and were part of the building located on the above described premises; that they became a permanent improvement to said building and enhanced the value thereof;" and "Eleventh: That said Continental Illinois National Bank & Trust Company of Chicago and Ronald L. Tree, as Trustees under the Last Will and Testament of Lambert Tree, deceased, knowingly authorized and directed the said Jens Pederson to construct permanent improvements upon the aforesaid premises, and that the said Jens Pederson did construct said permanent improvements upon the aforesaid premises, and plaintiff furnished lumber in the construction of such permanent improvements with the knowledge, permission and consent of George Psiharis, and Continental Illinois National Bank & Trust Company of Chicago and Ronald L. Tree, as Trustees under the Last Will and Testament of Lambert Tree, deceased." The master in his report makes no reference to the evidence upon which he based the aforesaid findings. There are certain facts that are undisputed: Plaintiff entered into an oral contract with one Jens Pederson, a building contractor, to furnish lumber to be used in the premises in question; that the Athenian Cafe, Inc., was a tenant of the Lambert Tree Estate and was operating a restaurant business in the premises; that defendant George Psiharis was the president of Athenian Cafe, Inc.; that Jens Pederson made a contract or contracts with the Athenian Cafe to furnish labor and material necessary in the making

which did not increase the value of the premises and which was intended to be removed by the tenant at the termination of its lease.

The cause was referred to a master, who filed a report which found, inter alia: "Savigny: That the above said number was used by

Jens Pedersen for the construction of said floors, walls and an office in the basement of the above described premises; that said flooring, walls and office became attached to and were part of the building located on the above described premises; that they became

a permanent improvement to said building and enhanced the value thereof;" and "Warranty: That said Continental Illinois National

Bank & Trust Company of Chicago and Donald L. Tree, as Trustees under the last will and Testament of Lambert Tree, deceased, knowingly

authorized and directed the said Jens Pedersen to construct permanent improvements upon the aforesaid premises, and that the said Jens

Pedersen did construct said permanent improvements upon the aforesaid premises, and plaintiff furnished labor in the construction of such

permanent improvements with the materials, provision and consent of George Pathria, and Continental Illinois National Bank & Trust

Company of Chicago and Donald L. Tree, as Trustees under the last Will and Testament of Lambert Tree, deceased." The master in his

report makes no reference to the evidence upon which he based the aforesaid findings. There are certain facts that are undisputed:

Plaintiff entered into an oral contract with one Jens Pedersen, a building contractor, to furnish labor to be used in the premises in

question; that the Athenian Cafe, Inc., was a tenant of the Lambert Tree Estate and was operating a restaurant business in the premises;

that defendant George Pathria was the president of the Athenian Cafe, Inc.; that Jens Pedersen made a contract of contract with the

Athenian Cafe to furnish labor and material necessary in the working

of certain improvements in the part of the premises occupied by the Athenian Cafe. Pederson admitted receiving from the latter sums aggregating \$2,400 during the performance of his contract. That plaintiff delivered lumber to the premises and received no pay for the same is undisputed. Objections filed by defendants to the master's report alleged that the master erred in finding that the lumber furnished by plaintiff became a permanent improvement to said building and enhanced the value thereof; that he further erred in finding that the Trustees knowingly permitted the construction of permanent improvements upon the premises, and that he further erred in finding that plaintiff was entitled to a mechanic's lien. The court sustained the exceptions filed by defendants to the master's report and entered the decree.

There is but one question involved on this appeal. Was the material delivered by plaintiff used in the construction of permanent improvements upon the premises in question? Plaintiff contends that this question should be answered in the affirmative. Defendants contend that the evidence shows clearly "that the storeroom, flooring, shelving, and partitions were constructed by the tenant merely for its own convenience in operating a restaurant business; that none of the lumber furnished by the plaintiff was permanently attached in any way to the building; that the storeroom in the basement could be taken out in sections and that the shelving could merely be unscrewed from the brackets. All of the lumber was used in making the premises suitable for the tenant and for constructing trade fixtures which, without damage to the building, can be removed and which are intended to be removed by the tenant at the end of its lease." Plaintiff concedes that before it would be entitled to a decree in its favor "it must establish by a preponderance of the evidence, the following facts: * * * D. That the material delivered by the sub-contractor was used in the construction of permanent

of certain improvements in the part of the premises occupied by the defendant. The defendant admitted receiving from the plaintiff a sum aggregating \$2,400 during the period of the lease. That plaintiff delivered lumber to the defendant and received no pay for the same is undisputed. Objections filed by defendant to the master's report alleged that the master erred in finding that the lumber furnished by plaintiff became a permanent improvement to said building and enhanced the value thereof; that no further error in finding that the trustees knowingly permitted the construction of permanent improvements upon the premises, and that he further erred in finding that plaintiff was entitled to a mechanic's lien. The court sustained the exceptions filed by defendants to the master's report and entered the decree. There is but one question involved on this appeal. Was the material delivered by plaintiff used in the construction of permanent improvements upon the premises in question? Plaintiff contends that this question should be answered in the affirmative. Defendants contend that the evidence shows clearly "that the above room, flooring, shelving, and partitions were constructed by the tenant merely for its own convenience in operating a restaurant business; that none of the lumber furnished by the plaintiff was permanently attached in any way to the building; that the improvements in the basement could be taken out in sections and that the shelving could easily be unscrewed from the brackets. All of the lumber was used in making the premises suitable for the tenant and for constructing trade fixtures which, without damage to the building, can be removed and which are intended to be removed by the tenant at the end of its lease." Plaintiff contends that before it could be entitled to a decree in its favor "it must establish by a preponderance of the evidence, the following facts: 1. That the material delivered by the subcontractor was used in the construction of permanent

improvements. * * *

Jens L. Pederson was called as a witness by plaintiff. He testified that the lumber billed by plaintiff was received at the place in question; that it was used for putting up partitions and for building "different kinds of stuff" and putting in new floors; that he could not remember how much lumber was used for partitions and how much was used for floors; that the partitions could not be taken out and used in other places; that they are built into that place.

Albert A. Schwartz, an architect, was called as a witness by both sides. He testified that he was employed by Psiharis to supervise the work in connection with the improvements in question; that he received his pay from the Athenian Cafe; that he was familiar with the work in connection with the lumber that was used; that "it was used for partitions. It was used for roof frames in tile partitions. It was used for a storeroom in the basement. It was used for joists for the storeroom in the basement and all frame lumber on the premises;" that some of the lumber was used for the flooring in the basement; that the flooring "was laid on 2x8 joists over the cement floor of the basement. That was laid in the storeroom in the basement. We built it for a storeroom, built in a manner that the under portion of that storeroom was used for storage purposes. It was erected on 2x6 studdings framed, and the floor was laid over that, and plywood was put around it on two sides. Q. Was that flooring in any way attached to the building, nailed to the building? A. The flooring was nailed onto the joists. It rested on the cement floor. Q. And how were the panels put in? A. The panels were put in ⁱⁿ sections. All panels were put in in sections and leaving openings for doors, and one for ventilation. Q. By the panels we mean the partitions. A. Yes. Q. And this office room, how

improvements.

John L. Pederson was called as a witness by Plaintiff. He testified that the lumber billed by Plaintiff was received at the place in question; that it was used for putting up partitions and for building "different kinds of stuff" and putting in new floors; that he could not remember how much lumber was used for partitions and how much was used for floors; that the partitions could not be taken out and used in other places; that they are built into that place.

Albert A. Schwartz, an architect, was called as a witness by both sides. He testified that he was employed by Pathearis to super-
vise the work in connection with the improvements in question; that he received his pay from the Athenian Cafe; that he was familiar with the work in connection with the lumber that was used; that it was used for partitions. It was used for roof frames in this partition. It was used for a storeroom in the basement. It was used for joists for the storeroom in the basement and all frame work on the premises; that some of the lumber was used for the flooring in the basement; that the flooring "was laid on 2x8 joists over the cement floor of the basement. That was laid in the storeroom in the basement. We built it for a storeroom, built in a manner that the entire portion of that storeroom was used for storage purposes. It was erected on 2x6 studs framed, and the floor was laid over that and plywood was put around it on two sides. It was that flooring in any way attached to the building, nailed to the building? A. The flooring was nailed onto the joists. It rested on the cement floor. Q. And how were the panels put in? A. The panels were put in sections. All panels were put in in sections and leaving openings for doors, and one for ventilation. Q. By the way, we mean the partitions. A. Yes. Q. And this office room, how

was that built? A. Well, that's the office room. That's the only room. Q. Oh, that is the only room? A. That is the only room. Q. Now, can that flooring and those partitions be removed without damage to the building? A. Oh, yes, sure. The basement was concrete. Q. How? A. The basement portion itself is concrete, concrete walls and concrete ceilings, and partitions of wood. All the basement partitions was wood. Q. Just set in, then? A. Yes." Upon cross-examination the following occurred: "Q. Mr. Schwartz, you say the basement floor was concrete? A. Yes. Q. Then there were some studdings put on the basement floor? A. That is right. Q. These studdings were nailed were they not, to each other? A. Yes. Q. And what else were they nailed to? A. They were nailed - that studding is four feet on centers. The partitions are between the studdings. Q. What were the studdings nailed to, if anything? A. You couldn't nail it to anything. It is placed against the floor and the beams, the concrete beams of the ceiling. Q. The concrete beams of the ceiling? A. Yes. Q. And then what was done in connection with the floor? Over the studdings was put what? A. Over the studdings was put joists. Q. And what were those joists nailed to? A. Nailed to the 2x4 studdings. Q. And then what was put over the joists? A. The studdings. Q. And they were nailed to the joists? A. Right. Q. And what else was put in there to make that room complete? A. Partitions. Partitions on two sides. The two brick, concrete walls from two ends of the room and two wood partitions squared or completed that room. Q. Now, what were those partitions attached to? A. They were screwed to the studdings, panel board partitions. Q. Screwed onto the studdings? A. Yes. Q. In order to remove it you would have to break all of that up, wouldn't you? All of that flooring and all of those joists? A. Yes. You would have to take it apart. You would have to take it apart. You couldn't move it out because you haven't

was that built? A. Well, that's the office room. That's the only room. Q. Oh, that is the only room? A. That is the only room. Q. Now, can that flooring and those partitions be removed without damage to the building? A. Oh, yes, sure. The basement concrete. Q. How? A. The basement portion itself is concrete. concrete walls and concrete ceilings, and partitions of wood. All the basement partitions was wood. Q. Just set in, then? A. Yes. Upon cross-examination the following occurred: "Q. Mr. Schuster, you say the basement floor was concrete? A. Yes. Q. Then there were some studs put on the basement floor? A. That is right. Q. These studs were nailed were they not, to each other? A. Yes. Q. And what else were they nailed to? A. They were nailed - that stud is four feet on centers. The partitions are between the studs. Q. But were the studs nailed to, if anything? A. You couldn't nail it to anything. It is placed against the floor and the beams, the concrete beams of the ceiling. Q. The concrete beams of the ceiling? A. Yes. Q. And then what was done in connection with the floor? Over the studs was put what? A. Over the studs was put joists. Q. And what were those joists nailed to? A. Nailed to the studs. Q. And then what was put over the joists? A. The studs. Q. And they were nailed to the joists? A. Right. Q. And what else was put in there to make that room complete? A. Partitions. Partitions on two sides. The two sides, concrete walls from two ends of the room, and two wood partitions secured or completed that room. Q. Now, what were those partitions attached to? A. They were attached to the studs, panel board partitions. Q. Now, once the studs are in place, A. Yes. Q. In order to remove it you would have to break all of that up, wouldn't you? All of that flooring and all of these joists? A. Yes. You would have to take it apart. You would have to take it apart. You couldn't move it out because you would

got big enough openings to get that size through. You have to do it in sections. Q. Well, that is the customary way of constructing a room in any place, is it not? A. Well, it's one of the customary ways of constructing, yes. You wouldn't construct -- in lathe and plaster rooms. These are panels. Q. These are panels, instead of lathe and plaster, is that right? A. Yes." Upon redirect the following occurred: "Q. Now, in your opinion as an architect, you say the room is usually constructed in the manner this was constructed. Is that for the purpose of taking them out, if you wanted to take them out? A. You could take them out, if you wanted to take them out in sections, yes. I asked them to make them so because we were figuring on fixing that upstairs into another room, in case they wouldn't let us use this. We could remove it. But we got by with the Building Department as it was. * * * Q. Another thing I wanted to ask you about, the ventilating system, that canopy over the stove -- A. Yes. Q. Could that be removed without materially injuring the building? A. Yes. Q. How is that attached? A. That is attached with strap hangers to the ceiling of the building. Q. And the flue? A. Suspended with straps. The flues is a series of pipes put together and put through the building. Q. And could that be removed without serious injury to the building? A. Yes. Q. I mean, without material injury to the building? A. Yes. Q. And do you know, from your experience as an architect, whether or not where a tenant puts in such a system of ventilation, whether or not it is removed by the tenant when he moves out of the premises? A. If he has any use for it. He can use it, if he has any use for it. If he was to rent another store and needed ventilating, he could remove all that and put it in the new location. Q. Without damaging it materially? A. That is right." Upon further cross-examination the following occurred: "Some of this lumber was used for shelving, was it? Upstairs, I mean. A. Yes, there was some lumber used for shelving upstairs. Q. And how was that shelving

Got big enough openings to get that air through. You have to do it in sections. Q. Well, that is the ordinary way of constructing a room in any place, is it not? A. Well, it's one of the ordinary ways of constructing, yes. You wouldn't construct -- in lathe and plaster rooms. These are panels. Q. These are panels, instead of lathe and plaster, is that right? A. Yes. You wouldn't construct the following occurred: "Q. Now, in your opinion as an architect, you say the room is usually constructed in the manner this was constructed. Is that for the purpose of taking them out, if you wanted to take them out? A. You could take them out, if you wanted to take them out in sections, yes. I asked them to make them so because we were figuring on fixing that upstairs into another room, in some way. Wouldn't it be use this, we could remove it. That was set by the the Building Department as it was. * * * Q. Another thing I wanted to ask you about, the ventilating system, that coming over the stove -- A. Yes. Q. Could that be removed without materially injuring the building? A. Yes. Q. Now is that standard? A. That is attached with strap hangers to the ceiling of the building. Q. And the lines? A. Suspended with straps. The lines is a series of pipes put together and put through the building. Q. And going that be removed without serious injury to the building? A. Yes. Q. I mean, without material injury to the building? A. Yes. Q. And do you know, from your experience as an architect, whether or not where a tenant puts in such a system of ventilation, whether or not it is removed by the tenant when he moves out of the premises? A. If he has any use for it, he can use it, if he has any use for it. If he has to rent another store and needed ventilating, he could remove all that and put it in the new location. Q. Without damaging it materially? A. That is right. Q. Then further examination the following occurred: "Some of this lumber was used for shelving, was it? Upstairs, I mean. A. Yes, there was some lumber used for shelving upstairs. Q. And how was that shelving

constructed? A. It was constructed on iron brackets, iron brackets into the wall and shelving laid right over the brackets. * * * Q. This shelving could be removed? A. Yes, this shelving could be removed. Q. It is just laid onto iron brackets? A. It is just screwed. Q. It is just screwed onto iron brackets? A. It is just screwed onto iron brackets, yes." Upon further redirect the following occurred: "Q. When you remove a plaster partition you destroy that partition, don't you? A. Absolutely. You can't remove a plaster partition. Q. But this partition you can remove the panels and parts without destroying the partition as a partition? A. That is right. Q. And you can set it up some place else? A. That is right. Q. And use it at another place? A. Yes."

Mr. Psiharis, the president of the Athenian company, testified that the flooring was laid on a cement floor; that the partitions are just temporary partitions; that "it is part of my fixtures, they have to go out any time the corporation goes out;" that they can be removed without destroying anything; that the floor is laid on 2x4's in the kitchen; that he can take it out; that when the Athenian Cafe lease is up the corporation intends to take these partitions with it; that the cooks would not work on the cement floor and that was the reason he had the wooden floor placed over the cement floor; that the flooring was part of the fixtures belonging to the corporation.

The witness Pederson was primarily responsible to plaintiff for the lumber furnished, but he did not pay plaintiff for it. It was to his interest to have plaintiff succeed in the instant case. Both sides called Schwartz, the architect, and we are satisfied that the trial court was justified in believing the testimony of Schwartz as to the nature of the improvements that were made in the premises with the lumber furnished by plaintiff. From Schwartz's testimony it clearly appears that the storeroom, flooring, shelving and partitions were constructed by the Athenian Cafe, the tenant, for its

constructed? A. It was constructed on first floor, from brackets into the wall and shelving laid right over the brackets. *** Q. This shelving could be removed? A. Yes, this shelving could be removed. Q. It is just laid onto iron brackets? A. It is just screwed. Q. It is just screwed onto iron brackets? A. It is just screwed onto iron brackets, yes. Upon further request the following occurred: "Q. When you remove a plaster partition you destroy that partition, don't you? A. Absolutely. You can't remove a plaster partition. Q. But this partition you can remove the panels and parts without destroying the partition as a partition? A. That is right. Q. And you can set it up some place else? A. That is right. Q. And use it as another place? A. Yes."

r. Pasharis, the president of the Athenian company, testified that the flooring was laid on a cement floor; that the partitions are just temporary partitions; that "it is part of my fixtures, they have to go out any time the corporation goes out;" that they can be removed without destroying anything; that the floor is laid on S&H's in the kitchen; that he can take it out; that when the Athenian Cafe lease is up the corporation intends to take these partitions with it; that the cooks would not work on the cement floor and that was the reason he had the wood n floor placed over the cement floor; that the flooring was part of the fixtures belonging to the corporation. The witness Pederson was primarily responsible to placing the fixtures for the lumber furnished, but he did not pay plaintiff for it. It was to his interest to have plaintiff succeed in the instant case. Both sides called Schwartz, the witness, and we are satisfied that the trial court was justified in believing the testimony of Schwartz as to the nature of the improvements that were made in the premises with the lumber furnished by plaintiff. From Schwartz's testimony it clearly appears that the storeroom, flooring, partitions and partitions were constructed by the Athenian Cafe, the tenant, for its

convenience in operating a restaurant business, and that none of the lumber furnished by plaintiff was permanently attached in any way to the building, and none of it was used for the construction of permanent improvements upon the premises. Indeed, plaintiff concedes that "the partitions and the floor for which the lumber was used, can at some future time, be taken apart and taken out of the building without damaging the structural part thereof," but it contends that, nevertheless, under the law it is entitled to its lien. Plaintiff cites two cases in support of its contention: Alexander Lumber Co. v. Champaign Baseball Club, 201 Ill. App. 246, and Beck Coal Co. v. Peterson Manf. Co., 237 Ill. 250. In the first case only an abstract of the decision is set forth but it appears from the syllabi and a short statement of the facts that the case is against plaintiff's position. In the second case the material facts are entirely different from those in the instant case. There a claim for lien of the Eagle Tank Company for two cisterns and several tanks furnished, to be used for the manufacturing business carried on in the building, was allowed for the reason that (p. 253) "the tanks stood in pits excavated for the purpose, and tanks and cisterns are all connected by pipes with the boilers and are part of the fixtures, apparatus and machinery of the factory." It appears (see p. 251 of the opinion) that the work and material furnished were used in the erection of the factory building belonging to the Peterson Manufacturing Company, against which the lien was allowed.

The Trustees of the Lambert Tree Estate, in their answer, allege, inter alia, that any lumber which may have been furnished by plaintiff to said premises was used in improvements of a temporary nature which did not increase the value of the premises and which were intended to be removed by the tenant at the termination of its lease. Psiharis testified that when the lease terminated the Athenian restaurant company had to take out the improvements. We

convenience in operating a restaurant business, and that none of the lumber furnished by plaintiff was permanently attached in any way to the building, and none of it was used for the construction of permanent improvements upon the premises. Indeed, plaintiff concedes that "the partitions and the floor for which the lumber was used, can at some future time, be taken apart and taken out of the building without damaging the structural part thereof," but it contends that, nevertheless, under the law it is entitled to its lien. Plaintiff cites two cases in support of its contention: Imperial Co. v. Champion Building Co., 201 Ill. App. 246, and Imperial Co. v. Peterson Building Co., 237 Ill. 650. In the first case only an abstract of the decision is set forth but it appears from the syllabi and a short statement of the facts that the case is against plaintiff's position. In the second case the material facts are entirely different from those in the instant case. There a claim for lien of the Eagle Tank Company for two disterns and several tanks furnished, to be used for the manufacturing business carried on in the building, was allowed for the reason that (p. 233) "the tanks stood in pits excavated for the purpose, and tanks and disterns are all connected by pipes with the boilers and are part of the fixtures, apparatus and machinery of the factory." It appears (see p. 231 of the opinion) that the work and material furnished were used in the erection of the factory building belonging to the Peterson Building Company, against which the lien was allowed.

The Trustees of the Lamb of Tree Estate, in their answer, allege, inter alia, that any lumber which may have been furnished by plaintiff to said premises was used in improvements of a temporary nature which did not increase the value of the premises and which were intended to be removed by the defendant at the expiration of its lease. Exhibits testified that when the improvements were made the Athenian restaurant company had no claim on the improvements.

are satisfied that the improvements were not intended by the restaurant company or the Trustees to become an integral part of the premises and that the said parties intended that they should be removed at the termination of the lease; that they were not permanently attached to the real estate and might be removed without any material damage to it; that they did not become an essential or integral part of the building and did not tend to enhance the value of the premises. The trial court did not err in denying plaintiff a lien.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Sullivan and Friend, JJ., concur.

are satisfied that the improvements were not intended by the
restaurant company or the trust to be made an integral part
of the premises and that the said parties intended that they
should be removed at the termination of the lease; that they
were not permanently attached to the real estate and might be
removed without any material damage to it; that they did not
become an essential or integral part of the building and did not
tend to enhance the value of the premises. The trial court did
not err in deeming plaintiff a tenant.

The decree of the Circuit Court of Cook County is

affirmed.

ORDERED AND ADJUDGED.

Sullivan and Ireland, J.J., concur.

42013

NATIONAL BUILDERS BANK OF CHICAGO,
a corporation, Administrator of
the estate of Gustav Gabrielson,
Deceased,

Appellant

v.

WALTER J. CUMMINGS and DANIEL C.
GREEN, as Receivers, etc., et al.,
doing business as Chicago Surface
Lines,

Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

315 I.A. 212²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Gustav Gabrielson was struck and killed while walking in front of an eastbound Madison street car at the intersection of Madison and Elizabeth streets, Chicago. National Builders Bank, as administrator of his estate, sued to recover damages, charging defendants with carelessly, negligently and improperly driving their street car at a high and dangerous rate of speed, without keeping a reasonably careful lookout for the approach of pedestrians and without sounding a bell or giving any other warning of the approach of the car. The court directed a verdict in favor of defendants at the close of plaintiff's case and entered judgment on the verdict. Plaintiff appeals.

By concession of the parties the question presented is whether plaintiff adduced any evidence that its intestate was in the exercise of due care for his own safety. Gust Georgeon, testifying on behalf of plaintiff, was the sole eyewitness to the accident which occurred at about 9:30 in the evening of September 17, 1938. Madison street runs in an easterly and westerly direction and it intersects at Elizabeth street with a slight jog of about five or ten feet. Elizabeth street is not a service stop for street cars. Throop street is immediately west of Elizabeth street. In this half block there are about seven stores, with a frontage of 25 or 30 feet, making an aggregate

NATIONAL BUILDERS BANK OF CHICAGO,
 a corporation, administrator of
 the estate of Gustav Gabrielson,
 Deceased,
 Appellant,
 v.
 WALTER J. CUMMINGS and DANIEL C.
 GREEN, as Receivers, etc., et al.,
 doing business as Chicago Builders
 Lines,
 Appellees.

MR. JUSTICE FRANKLIN DELIVERED THE OPINION OF THE COURT.
 Gustav Gabrielson was struck and killed while walking in
 front of an eastbound Madison street car at the intersection of
 Madison and Elizabeth streets, Chicago. National Builders Bank,
 as administrator of his estate, sued to recover damages, charging
 defendants with carelessly, negligently and improperly driving
 their street car at a high and dangerous rate of speed, without
 keeping a reasonably careful lookout for the approach of pedestri-
 ans and without sounding a bell or giving any other warning of the
 approach of the car. The court directed a verdict in favor of
 defendants at the close of plaintiff's case and entered judgment
 on the verdict. Plaintiff appeals.
 By concession of the parties the question presented is
 whether plaintiff advanced any evidence that its intestate was in
 the exercise of due care for his own safety. Gust Gabrielson,
 testifying on behalf of plaintiff, was the sole eyewitness to
 the accident which occurred at about 9:30 in the evening of
 September 17, 1938. Madison street runs in an easterly and
 westerly direction and it intersects at Elizabeth street with a
 slight jog of about five or ten feet. Elizabeth street is not a
 service stop for street cars. Throop street is immediately west
 of Elizabeth street. In this half block there are about seven
 stores, with a frontage of 25 or 30 feet, making an aggregate

distance between the two streets of from 175 to 210 feet. Gabrielson was crossing Madison street, going south on the west side of Elizabeth street. The witness, who was standing on the northeast corner of the intersection, testified that when deceased stepped off the curb before crossing, the street car was in the middle of the block between Elizabeth and Throop streets, or a distance of about 90 to 105 feet from the crosswalk. It was a rainy night and the deceased was walking fast, and as he crossed the first or westbound track, "he was rushing." The street car hit him as he was crossing the eastbound track.

With respect to the specific charges of negligence, namely, the operation of the car, its speed, the visibility on the evening in question and the giving of warning, Georgeon testified that the street car "was coming full speed;" that it was on the eastbound track, going along at the regular speed that Madison street cars travel between blocks, going "pretty fast" when it hit this man; that "The man crossed the first track to go over and he was rushing and the street car was coming fast, and he was trying to slow down, but he got him." There is no evidence from which it may be determined what speed this particular witness considered as "pretty fast," and in the absence of such testimony his statement is of no probative value. In Roberts, Admr. v. Chicago City Ry. Co., 262 Ill. 228, there was some opinion evidence of like character but the court held that the term "pretty fast" "is a relative term, which conveys no definite idea to the mind when not stated in comparison with the ordinary rate of speed or some definite standard, and there was no evidence tending to show that either car was going at more than such ordinary rate. There was nothing in the circumstances which would justify an inference that either car was running at a dangerous or unlawful rate of speed." There is undisputed evidence that the street car stopped ^{about} within 30 feet, which is less than the length of the car, and therefore it cannot be inferred that it was going at an unreasonable rate

distance between the two streets of from 175 to 180 feet. Elizabeth was crossing Madison street, going south on the west side of Elizabeth street. The witness, who was standing on the northeast corner of the intersection, testified that when deceased stepped off the curb before crossing, the street car was in the middle of the block between Elizabeth and Throop streets, or a distance of about 90 to 100 feet from the crosswalk. It was a rainy night and the deceased was walking fast, and as he crossed the first or westbound track, "he was rushing." The street car hit him as he was crossing the eastbound track. With respect to the specific charges of negligence, namely, the operation of the car, its speed, the visibility on the evening in question and the giving of warning, George testified that the street car "was coming full speed;" that it was on the eastbound track, going along at the regular speed that Madison street cars travel between blocks, going "pretty fast" when it hit this man; that "The man crossed the first track to go over and he was rushing, and the street car was coming fast, and he was trying to slow down, but he got him." There is no evidence from which it may be determined what speed this particular witness considered as "pretty fast," and in the absence of such testimony his statement is of no probative value. In Roberts v. Chicago City Ry. Co., 502 Ill. 228, there was some opinion evidence of like character but the court held that the term "pretty fast" is a relative term, which conveys no definite idea to the mind when not stated in comparison with the ordinary rate of speed or some definite standard, and there was no witness tending to show that either car was going faster than such ordinary rate. There was nothing in the circumstances which would justify an inference that either car was running at a dangerous or unlawful rate of speed. There is undisputed evidence that the street car stopped about 30 feet, which is less than the length of the car, and therefore it cannot be inferred that it was going at an unreasonable rate

of speed, and the evidence would not justify such an inference.

The eyewitness offered no testimony, one way or the other, about the sounding of a gong, and therefore any inference in support of plaintiff, who had the burden of proof, that the gong was not sounded, would be purely conjectural.

With respect to visibility, Georgeon testified that the deceased was watching the traffic on both sides; that the street car was fully lighted; and that he (the witness) "had no trouble seeing the car. *** The street car was in plain view. *** I saw nothing to interfere with the man watching the street car or seeing it. He was watching both sides." The eyewitness further said that Madison street cars do not make much noise and that he did not think that this particular car was making any noise, but "anybody could hear the car coming."

The law is well settled that ordinary care is a question of fact for the jury only "when there is evidence for the jury to consider upon that point." City of Chicago v. Richardson, 75 Ill. App. 198. And our courts of review have consistently held that plaintiff has the burden of affirmatively proving that he was in the exercise of due care. Dee v. City of Peru, 343 Ill. 36; Illinois Central R. Co. v. Oswald, 338 Ill. 270. In view of these established principles of law, we think the court properly instructed the jury to return a verdict in favor of defendants, since the only eyewitness failed to adduce any evidence which, in its aspect most favorable to plaintiff, together with all reasonable inferences arising therefrom, indicates that deceased was in the exercise of due care for his own safety.

Plaintiff's counsel argues that certain inferences should be drawn from Georgeon's testimony, especially with respect to the rate of speed of the oncoming street car, the sounding of a gong or other warning signal, and the question of visibility. However, the law is equally well settled that inferences which may be con-

of speed, and the evidence would not justify such an inference. The eyewitness offered no testimony, one way or the other, about the sounding of a gong, and therefore any inference in support of plaintiff, who had the burden of proof, that the gong was not sounded, would be purely conjectural.

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The law is well settled that ordinary care is a question of fact for the jury only "when there is evidence for the jury to consider upon that point." City of Chicago v. Rich, 175 Ill. App. 198. And our courts of review have consistently held that plaintiff has the burden of affirmatively proving that he was in the exercise of due care. Dee v. City of Peoria, 343 Ill. 36; Illinois Central R. Co. v. Oswald, 338 Ill. 270. In view of these established

principles of law, we think the court properly instructed the jury to return a verdict in favor of defendants, since the only eyewitness failed to advance any evidence which, in its aspect most favorable to plaintiff, together with all reasonable inferences arising therefrom, indicates that deceased was in the exercise of due care for his own safety.

Plaintiff's counsel argues that certain inferences should be drawn from Georgeon's testimony, especially with respect to the rate of speed of the oncoming street car, the sounding of a gong or other warning signal, and the question of visibility. However, the law is equally well settled that inferences which may be con-

sidered as tending to prove a fact are such inferences only as may be legitimately and naturally drawn from the facts proved by the evidence. This does not permit of a resort to conjecture or a choice between two views which are equally compatible with the evidence.

Lyons v. Chicago City Railway Co., 258 Ill. 75; Stevens v. Illinois Central R. R. Co., 306 Ill. 370; Condon v. Schoenfeld, 214 Ill. 226.

It appears from Georgeon's evidence that when deceased was at the curb and about to cross Madison street, he looked, and it must therefore be presumed that he saw the eastbound Madison street car when it was approximately 100 feet away. The street car was fully lighted and although it made less noise than cars on some other streets, "anybody could hear the car coming." Although the car was described as going "pretty fast," the witness said it was proceeding at the regular speed across an intersection which the parties concede is not a service stop for street cars. Nevertheless, after stepping from the curb, the intestate walked across Madison street over the westbound track, evidently fully aware of the oncoming car; "he was rushing" and was struck at some point on the eastbound track which is not clearly described by the eyewitness. In none of these circumstances nor any combination of them, is there any evidence tending to prove that plaintiff's intestate was in the exercise of due care for his own safety, and the court was therefore justified in directing a verdict and entering judgment accordingly. The judgment of the Circuit court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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Lyons v. Chicago City Railway Co., 258 Ill. 75; Evans v. Illinois

JUDGE WILLIAM D.

Scarlata, P. J., and Sullivan, J., comment.

42053

LOUISE SCHULENBURG,

Appellee,

v.

CITY OF CHICAGO,

Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

313 I.A. 213

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff fell and was injured on a defective sidewalk abutting premises owned by her on Milwaukee avenue, Chicago. She brought suit to recover damages from the city, charging negligence on the part of defendant in failing to maintain and keep the sidewalk in a reasonably safe condition. The jury returned a verdict in her favor for \$750 upon which the court entered judgment. The city has taken an appeal.

The essential facts disclose that plaintiff and her family had long been the owners of the premises known as 1501 Milwaukee avenue, Chicago, which is improved with a two-story building containing a store on the ground floor and plaintiff's apartment, where she maintained a dressmaking establishment, on the second floor. For about five years prior to 1938 the sidewalk in front of the premises was "buckled" and sloped perceptibly from the building to the street. This sloping condition had raised part of the sidewalk and broken off a piece of the cement, causing a hole about two and one-half feet from the building in front of the store, which was approximately three inches in depth. There were two entrances to the building, one on Honore street and another between plaintiff's building and the adjoining premises on Milwaukee avenue.

Shortly after 11:00 o'clock on the evening of June 16, 1938 plaintiff, then about 62 years of age, was returning from a neighborhood motion picture theater with her daughter. It was raining and the sidewalk was wet. As they approached the building, plaintiff's

LOUIS SCHNEIDERMAN

Appellee

v.

CITY OF CHICAGO

Appellant

COOK COUNTY

CIRCUIT COURT

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

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Milwaukee Avenue, Chicago, which is improved with a two-story

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the building to the street. This sloping condition had existed since

of the sidewalk and broken off a piece of the cement, causing a hole

about two and one-half feet from the building in front of the store,

which was approximately three inches in depth. There were two

entrances to the building, one on Monroe Street and another between

plaintiff's building and the adjoining premises on Milwaukee Avenue.

Shortly after 11:00 o'clock on the evening of June 16, 1933

plaintiff, then about 62 years of age, was returning from a neighbor-

hood motion picture theater with her daughter. It was raining and

the sidewalk was wet. As they approached the building, plaintiff's

daughter walked ahead to open the door for her mother and plaintiff followed her. She caught her foot in the hole in the sidewalk and was thrown and injured. The photographs of the sidewalk received in evidence show a perceptible break and the hole which caused the injury. The city concedes that the sidewalk was defective and should have been repaired, and the only ground urged for reversal is that there was no evidence of due care to go to the jury.

Plaintiff admitted that she had known of the buckled condition of the sidewalk for a considerable period, but "I didn't know the hole was there. I knew the condition of the sidewalk, it was slanting. The curbs were up but I didn't know that hole was there." Two other witnesses testified that the hole had been there for several months and that plaintiff was frequently seen to pass along the sidewalk, where the defective condition could be readily observed. From this circumstance it is argued by the city that plaintiff had knowledge of the dangerous condition and was therefore guilty of contributory negligence as a matter of law. Plaintiff, however, testified that "I wouldn't go by there for three months because I had no occasion to go in there."

The rule of law applicable to the circumstances is well settled. It was incumbent on plaintiff to prove that she was in the exercise of due care. In Dee v. City of Peru, 343 Ill. 36, the court said that while the question of due care is one for the jury when there is evidence of due care, it is a question of law whether or not there is any such evidence, and the decisions in this state are uniformly to that effect. Under this rule the court would not have been justified in holding, as a matter of law, that there was no evidence of due care on the part of plaintiff. She testified positively that she did not know the hole was there and had never seen it, and denied the statement of two other witnesses that she frequently passed over the sidewalk, asserting that she had no occasion to go by there and seldom did so. It

daughter walked ahead to open the door for her mother and plaintiff followed her. She caught her foot in the hole in the sidewalk and was thrown and injured. The photographs of the sidewalk received in evidence show a perceptible break and the hole which caused the injury. The city conceded that the sidewalk was defective and should have been repaired, and the only ground urged for reversal is that there was no evidence of due care to the jury. Plaintiff admitted that she had known of the broken condition of the sidewalk for a considerable period, but "I didn't know the hole was there. I knew the condition of the sidewalk, it was slanting. The curbs were up but I didn't know that hole was there." Two other witnesses testified that the hole had been there for several months and that plaintiff was frequently seen to pass along the sidewalk, where the defective condition could be readily observed. From this circumstance it is argued by the city that plaintiff had knowledge of the dangerous condition and was therefore guilty of contributory negligence as a matter of law. Plaintiff, however, testified that "I wouldn't go by there for three months because I had no occasion to go in there."

The rule of law applicable to the circumstances is well settled. It was incumbent on plaintiff to prove that she was in the exercise of due care. In Doe v. City of New York, 133 Ill. 36, the court said that while the question of due care is one for the jury when there is evidence of due care, it is a question of law whether or not there is any such evidence, and the decision in this case was uniformly to that effect. Under this rule the court would not have been justified in holding, as a matter of law, that there was no evidence of due care on the part of plaintiff. She testified positively that she did not know the hole was there and had never seen it, and denied the statement of two other witnesses that she frequently passed over the sidewalk, admitting that she had no occasion to go by there and seldom did so. It

therefore became a question of fact for the jury as to whether or not she was in the exercise of due care. The city does not seriously contend that the verdict was contrary to the manifest weight of the evidence, but argues that by reason of her familiarity with the sloping condition of the sidewalk abutting property of which she was the owner, she should have had knowledge of the dangerous condition, especially because of her personal interest in having a good sidewalk in front of her own property. The city concedes that there is no rule of law in Illinois that gives the city an absolute defense when sued by the owner and occupant of property who has been injured by reason of a defect in the abutting sidewalk, and that the owner has no duty to repair defects, whereas the city has. Under the circumstances, the burden cast upon plaintiff of proving that she was in the exercise of due care for her own safety was no greater or less than that of any other pedestrian. Her evidence, taken together with the evidence adduced by other witnesses, presented a question of fact for the jury. Plaintiff asks for statutory damages, because, as she contends, the appeal was taken for purposes of delay. The request is denied.

The case was fairly tried and no point is made as to the amount of the verdict. We find no convincing reason for reversal and, therefore, the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

therefore, because a question of fact for the jury as to whether or not she was in the exercise of due care. The city does not seriously contend that the verdict was contrary to the weight of the evidence, but argues that by reason of her familiarity with the sloping condition of the sidewalk building property of which she was the owner, she should have had knowledge of the dangerous condition, especially because of her personal interest in having a good sidewalk in front of her own property. The city contends that there is no rule of law in Illinois that gives the city an absolute defense when sued by the owner and occupant of property who has been injured by reason of a defect in the building sidewalk, and that the owner has no duty to repair defects, whereas the city has. Under the circumstances, the burden cast upon plaintiff of proving that she was in the exercise of due care for her own safety was no greater or less than that of any other pedestrian. Her evidence, taken together with the evidence advanced by other witnesses, presented a question of fact for the jury. Plaintiff asks for statutory damages, because, as she contends, the appeal was taken for purposes of delay. The request is denied. The case was fairly tried and no point is made as to the amount of the verdict. We find no convincing reason for reversal and, therefore, the judgment of the Circuit Court is affirmed.

REVEREND JUSTICE.

Seaman, J. J., and Sullivan, J., concur.

42066

MARY SOIC, Appellant,

v.

GUY A. RICHARDSON and
WALTER J. CUMMINGS, as
receivers, etc., et al.,
doing business as CHICAGO
SURFACE LINES, and PAUL A.
GADE, sometimes known as
P. GOFTE, Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

315 I.A. 213⁷

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, who was struck and injured by defendants' motor vehicle, a feeder bus, while crossing Archer avenue at or near Meade avenue, Chicago, brought suit to recover damages, charging defendants with negligence in improperly operating their motor vehicle, at an unreasonable rate of speed, without sounding a warning signal or keeping a sufficient lookout. At the close of plaintiff's case the court directed a verdict in favor of defendants, and entered the judgment from which plaintiff appeals.

Archer avenue is a paved four-lane highway known as Route 4-A. The neighborhood of the accident is sparsely settled. The speed limit for traffic along that part of the highway where the accident occurred is 35 miles an hour. The only building on the south side of the highway in the block where the accident occurred is the Midwest grocery store, which is about 100 feet from the nearest crosswalk. Plaintiff, who was about 58 years old, resided at 5326 South Melvina avenue. She was on her way to the Midwest grocery store to do her shopping, and was thoroughly familiar with the surrounding neighborhood. She approached Archer avenue from her home by walking across a prairie to the east side of Meade avenue, and then proceeded south along the east side of

42066

MARY SOIC, Appellant,

v.

GUY A. RICHARDSON and
WALTER J. COLEMAN, as
receivers, etc., et al.
doing business as CHICAGO
SURFACE LINES, and FAY A.
GAGE, sometimes known as
P. GOTTIE,
Appellees.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE PHILIP DELIVERED THE OPINION OF THE COURT.

Plaintiff, who was struck and injured by defendants,

motor vehicle, a feeder bus, while crossing Archer Avenue at or
near Meade Avenue, Chicago, from suit to recover damages,

charging defendants with negligence in improperly operating
their motor vehicle, at an unreasonable rate of speed, without
sounding a warning signal or keeping a sufficient lookout. It

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favor of defendants, and entered the judgment from which plain

tiff appeals.

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The speed limit for traffic along that part of the highway where
the accident occurred is 35 miles an hour. The only building on

the south side of the highway in the block where the accident

occurred is the Midwest Grocery store, which is about 100 feet

from the nearest crosswalk. Plaintiff, who was about 35 years

old, resided at 5326 South Melvin Avenue. She was on her way

to the Midwest Grocery store to do her shopping, and was thoroughly

familiar with the surrounding neighborhood. She approached Archer

avenue from her home by walking across a prairie to the east side

of Meade Avenue, and then proceeded south along the east side of

Meade avenue to Archer avenue. She testified that she stopped when she reached Archer avenue, but had no memory of what occurred thereafter. Physicians testified that, among other injuries, she suffered a retrograde amnesia or loss of memory, and was therefore unable to testify with respect to any of the events subsequent to the time that she came to a stop at the north curb of Archer avenue before crossing the highway.

The feeder bus was traveling west on the north lane of the highway at a speed not exceeding 35 miles an hour. After plaintiff had crossed the outer north lane of the highway, she was struck by the front right corner of the feeder bus, thrown to the pavement and injured.

There was a truck standing on the dirt just south of the south lane of the pavement of the highway near the Midwest grocery store. The bus^{was} in plain view and there was nothing to interfere with the view of motorists or pedestrians. The accident occurred shortly after noon August 27, 1938 on a clear bright day.

Charles Vinci, testifying on behalf of plaintiff, said that he was driving an automobile in an easterly direction on the other side of the highway. When he first saw plaintiff she was crossing Archer avenue and was between the first and second lanes on the north side of the highway. Vinci did not see her on the sidewalk at any time. He testified that she was walking slowly in a southerly direction, and could not say whether she was watching traffic or not. When she reached the center of the street the bus was about 10 to 20 feet away from her. Immediately before the impact the driver of the bus evidently turned to the left in an effort to avoid her, and in so doing he struck the rear end of Vinci's automobile and knocked it up against the truck which was parked near the store. According to his testimony, the accident occurred near the store and some 50 feet or more from the intersection.

-2-

Meade Avenue to Archer Avenue. She testified that she stopped when she reached Archer Avenue, but had no memory of what occurred thereafter. Physicians testified that, among other injuries, she suffered a retrograde amnesia or loss of memory, and was therefore unable to testify with respect to any of the events subsequent to the time that she came to a stop at the north curb of Archer Avenue before crossing the highway.

The feeder bus was traveling west on the north lane of the highway at a speed not exceeding 35 miles an hour. After plaintiff had crossed the outer north lane of the highway, she was struck by the front right corner of the feeder bus, thrown to the pavement and injured.

There was a truck standing on the dirt just south of the south lane of the pavement of the highway near the Midwest Grocery store. The bus ^{was} in plain view and there was nothing to interfere with the view of motorists or pedestrians. The accident occurred shortly after noon August 27, 1938 on a clear bright day.

Charles Vinel, testifying on behalf of plaintiff, said that he was driving an automobile in an easterly direction on the other side of the highway. When he first saw plaintiff she was crossing Archer Avenue and was between the first and second lanes on the north side of the highway. Vinel did not see her on the sidewalk at any time. He testified that she was walking slowly in a southerly direction, and could not say whether she was watching traffic or not.

When she reached the center of the street the bus was about 10 to 20 feet away from her. Immediately before the impact the driver of the bus evidently turned to the left in an effort to avoid her, and in so doing he struck the rear end of Vinel's automobile and knocked it up against the truck which was parked near the store. According to his testimony, the accident occurred near the store and some 50 feet or more from the intersection.

Frank Blazvick, a passenger on the bus, testified that the bus, which was in the lane on the right side, suddenly turned or swung to the left and stopped. While it was making the turn or swing, he saw plaintiff at the front facing the bus and about 15 feet away. Neither Vinci nor Blazvick heard any horn or signal blown before the collision.

Fred Nicholson, a police officer who arrived after the accident, said that the bus was on the south side of Archer avenue facing east, about 50 to 75 feet from the intersection of Meade avenue and about 20 feet west of the grocery store. From the undisputed evidence it appears to be an established fact that plaintiff was crossing the highway not at the crosswalk, but at a point some distance therefrom.

The rule is well settled that in considering a motion for a directed verdict the court is not permitted to weigh the evidence, but must consider the plaintiff's evidence as true, together with such inferences favorable to plaintiff as may legitimately be drawn from the facts adduced upon the hearing. In the case at bar the only evidence given was produced by plaintiff's witnesses. It is an equally well settled rule, requiring no citation of authority, that one seeking to recover has the burden of proving that he was in the exercise of due care and caution for his own safety. The question therefore presented is whether plaintiff produced any evidence of due care for her own safety. The undisputed proof indicates that the feeder bus was not exceeding the lawful speed limit at the time of the accident. It is equally well established by plaintiff's own witnesses that she was struck some distance from the intersection, that she had a clear view of the highway, that there were no vehicles traveling along the highway except the bus which struck her and Vinci's car, which was proceeding east on the opposite side of the highway. Although there is some evidence that plaintiff stopped before crossing Archer avenue, none of the witnesses was

Frank Blawick, a passenger on the bus, testified that the bus, which was in the lane on the right side, suddenly turned or swung to the left and stopped. While it was making the turn or swing, he saw plaintiff at the front facing the bus and about 15 feet away. Neither Vincent nor Blawick heard any horn or signal blown before the collision.

Fred Nicholson, a police officer who arrived after the accident, said that the bus was on the south side of Archer Avenue facing east, about 70 to 75 feet from the intersection of 12th Avenue and about 20 feet west of the grocery store. From the undisputed evidence it appears to be an established fact that plaintiff was crossing the highway not at the crosswalk, but at a point some distance therefrom.

The rule is well settled that in considering a motion for a directed verdict the court is not permitted to weigh the evidence, but must consider the plaintiff's evidence as true, together with such inferences favorable to plaintiff as may legitimately be drawn from the facts advanced upon the hearing. In the case at bar the only evidence given was produced by plaintiff's witnesses. It is an equally well settled rule, requiring no citation of authority, that one seeking to recover has the burden of proving that he was in the exercise of due care and caution for his own safety. The question therefore presented is whether plaintiff produced any evidence of due care for her own safety. The undisputed proof indicates that the federal bus was not exceeding the lawful speed limit at the time of the accident. It is equally well established by plaintiff's own witnesses that she was struck some distance from the intersection, that she had a clear view of the highway, that there were no vehicles traveling along the highway except the bus which struck her and Vincent's car, which was proceeding west on the opposite side of the highway. Although there is some evidence that plaintiff stopped before crossing Archer Avenue, none of the witnesses was

able to say that she looked in either direction, and if she stopped, her purpose in doing so is left to conjecture. Since she had a clear and unobstructed view of Archer avenue and the traffic thereon, there was evidently no occasion to stop for the purpose of observing the condition of the traffic. From an analysis of the testimony of her own witnesses, it may be reasonably inferred that she was crossing Archer avenue in a diagonal direction, and that she crossed in front of the bus without making any visible effort to avoid being struck. Under the circumstances there would be no warrant in law for a finding that she was in the exercise of due care for her own safety. In Newell v. The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 261 Ill. 505, the court said that the "allegation in the declaration that deceased was in the exercise of due care and caution for his own safety at the time of the accident was a necessary and material allegation and must be proven. *** To establish and apply a general presumption in favor of care would obviate the necessity of making proof of the fact, which this court has uniformly held must be made."

Plaintiff was familiar with the highway, having crossed it almost daily on her way to and from the Midwest store, and was aware of the traffic conditions along Archer avenue. The speed permitted for vehicles at that place was 35 miles an hour, and the evidence discloses that the feeder bus was not exceeding this rate of speed. There is nothing in the evidence to indicate that there was any urgency or necessity for plaintiff to cross the highway in front of the bus. Vehicles of that kind cannot be stopped instantly, whereas a person on foot may stop almost instantly on the appearance of danger, and a reasonably cautious person should take this into consideration in the exercise of due care for his or her own safety. (Russell v. Richardson, 308 Ill. App. 11.) It was said in the Russell case that where the danger is obvious to a person of ordinary intelligence, the law will charge him with knowledge of it; that "The purpose of looking, as an act of caution, is to determine what one shall safely

able to say that she looked in either direction, and if she stopped, her purpose in doing so is left to conjecture. Since she had a clear and unobstructed view of Archer Avenue and the traffic thereon, there was evidently no occasion to stop for the purpose of observing the condition of the traffic. From an analysis of the testimony of her own witnesses, it may be reasonably inferred that she was crossing Archer Avenue in a diagonal direction, and that she crossed in front of the bus without making any visible effort to avoid being struck. Under the circumstances there would be no warrant in law for a finding that she was in the exercise of due care for her own safety. In Newell v. The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 261 Ill. 505, the court said that the "allegation in the declaration that deceased was in the exercise of due care and caution for his own safety at the time of the accident was a necessary and material allegation and must be proven. *** To establish and apply a general presumption in favor of care would obviate the necessity of making proof of the fact, which this court has uniformly held must be made."

Plaintiff was familiar with the highway, having crossed it almost daily on her way to and from the highest store, and was aware of the traffic conditions along Archer Avenue. The speed permitted for vehicles at that place was 35 miles an hour, and the evidence discloses that the Federal bus was not exceeding this rate of speed. There is nothing in the evidence to indicate that there was any urgency or necessity for plaintiff to cross the highway in front of the bus. Vehicles of that kind cannot be stopped instantly, whereas a person on foot may stop almost instantly on the appearance of danger, and a reasonably cautious person should take this into consideration in the exercise of due care for his or her own safety. (Newell v. Richardson, 308 Ill. App. 11.) It was said in the Richardson case that where the danger is obvious to a person of ordinary intelligence, the law will charge him with knowledge of it; that "The purpose of looking, as an act of caution, is to determine what one shall safely

do next; ordinarily this will be to move or to stand still; hence the looking must be done when and where one can act safely with reference to any danger observed, otherwise the act of looking is minus the element of caution."

Plaintiff's counsel argue that due care may be shown by circumstantial as well as by direct evidence, and that plaintiff's loss of memory, due to the injury, and her consequent inability to testify to the events that immediately preceded the accident, should not militate against her. It is unfortunate, of course, that plaintiff was not able to adduce evidence favorable to her cause by reason of her condition, but the evidence presented by other witnesses who testified in her behalf fails to show that she was in the exercise of due care. We are obliged to decide the appeal upon the record presented, and would not be justified in drawing inferences which are not legitimately predicated upon facts established by the evidence or resorting to conjecture unsupported by facts.

For the reasons set forth, we are of opinion that there was no error in directing a verdict in favor of defendants, and the judgment entered upon the verdict is accordingly affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

do next; ordinarily this will be to move on to another still; hence

the looking must be done when and where one can act safely with reference to any danger observed, otherwise the act of looking is

minus the element of caution."

Plaintiff's counsel argue that due care may be shown by cir-

cumstantial as well as by direct evidence, and that plaintiff's loss of memory, due to the injury, and her consequent inability to testify

to the events that immediately preceded the accident, should not militate against her. It is unfortunate, of course, that plaintiff was not able to adduce evidence favorable to her cause by reason of

her condition, but the evidence presented by other witnesses who testified in her behalf fails to show that she was in the exercise of due care. We are obliged to decide the appeal upon the record presented, and would not be justified in drawing inferences which are not legitimately predicated upon facts established by the evi-

dence or resorting to conjecture unsupported by facts.

For the reasons set forth, we are of opinion that there

was no error in directing a verdict in favor of defendants, and the judgment entered upon the verdict is accordingly affirmed.

JUDGMENT AFFIRMED.

Geenan, P. J., and Sullivan, J., concur.

42076

GERTRUDE C. HART,
Appellee,

v.

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

315 I.A. 214

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

An automobile, belonging to the City of Chicago and driven by one of its civil service employees, backed into plaintiff, who was standing on Randolph street between Clark and LaSalle streets, Chicago, and caused injuries for which she sued in tort and had judgment for \$1,500 pursuant to the verdict of a jury, from which the city appeals.

The accident occurred about 3:00 o'clock in the afternoon November 7, 1938. Plaintiff had left the County Building at the north entrance on Randolph street, intending to cross the street to the Sherman Hotel. She was standing in the street about ten or twelve feet north of the south curb, and according to her testimony she had stopped at that point to look for approaching traffic and saw none coming from either the east or the west. A city automobile, used by the superintendent of parks and driven by Allen Leonard, had stopped about six feet from the curb, just to the east of the point where plaintiff was standing, and was parked there for the temporary purpose of backing up and parking along the curb on the south side of Randolph street. Apparently there was not quite room enough, and accordingly Leonard motioned to a police officer who was stationed ahead of him and who requested the driver of a car at the curb to drive forward so as to give Leonard more room for parking. Leonard then also drove forward about five feet and started to back up. He testified that before backing he looked out of the door of his car and turned around and

42070

GERTRUDE C. HART
Appellant.

v.

CITY OF CHICAGO,
Municipal Corporation,
Appellant.

IN JUSTICE FRANK DELIVERED THE DECISION OF THE COURT.

An automobile, belonging to the City of Chicago and driven by one of its civil service employees, backed into plaintiff's car, which was standing on Randolph street between Clark and LaSalle streets, Chicago, and caused injuries for which she sued in tort and had judgment for \$1,500 pursuant to the verdict of a jury, from which the city appeals.

The accident occurred about 1:00 o'clock in the afternoon November 7, 1936. Plaintiff had left the laundry building at the north entrance on Randolph street, intending to cross the street to the Sherman Hotel. She was standing in the street about ten or twelve feet north of the south curb, and according to her testimony she had stopped at that point to look for approaching traffic and saw none coming from either the east or the west. A city mobile, used by the superintendent of parks and driven by Allan Leonard, had stopped about six feet from the curb, just to the east of the point where plaintiff was standing, and was parked there for the temporary purpose of backing up and parking along the curb on the south side of Randolph street. Apparently there was not quite room enough, and accordingly Leonard motioned to a police officer who was stationed ahead of him and who requested the driver of a car at the curb to drive forward so as to give Leonard more room for parking. Leonard then also drove forward about five feet and started to back up. He testified that before backing he looked out of the rear of his car and turned around and

looked out of the back window, but did not see anyone in the rear of his car. According to his testimony he had backed not more than two feet when "something bumped the side of the car" on the left rear. He stopped the car, walked out to the rear and then to the sidewalk where he saw plaintiff walking toward the Randolph street entrance of the County Building. A traffic officer was called and, together with Leonard, they assisted her into Leonard's car to await officers from the accident prevention bureau, who, upon their arrival, accompanied plaintiff to the office of the city physician in the City Hall, where an X-ray was taken, and plaintiff was then driven to her home on the north side in Chicago. No point is made as to the amount of the verdict, and therefore it is not necessary to discuss the extent of plaintiff's injuries.

It is urged as ground for reversal that the verdict was against the manifest weight of the evidence, both on the question of defendant's negligence and as to the care exercised by plaintiff for her own safety. The city's counsel say that the outstanding fact in the case, both on the question of defendant's alleged negligence and of plaintiff's alleged contributory negligence, is that she was crossing a busy street near the middle of the block and not at the crosswalk, and it is argued that both by the statute (par. 75 of the Uniform Act Regulating Traffic on Highways, chap. 95-1/2, sec. 172, Ill. Rev. Stat. 1941) and the municipal code (sec. 27-41 of the Municipal Code of Chicago) defendant's car had the right of way. No instructions were offered on this phase of the case, and it must be conceded that although plaintiff was ^{in the street} at the point heretofore indicated, seeking to cross between intersections, this did not constitute negligence per se but was only prima facie evidence of her negligence, to be considered along with the other facts and circumstances in evidence. Tuttle v. Checker Taxi Co., 274 Ill. App. 525. None of the witnesses testified as to any warning signal.

looked out of the back window, but did not see anyone in the rear of his car. According to his testimony he had parked not more than two feet from "something bump" the side of the car on the left rear. He stopped the car, walked out to the rear and then to the sidewalk where he saw plaintiff walking toward the Randolph street entrance of the County Building. A traffic officer was called and together with Leonard, they assisted her into Leonard's car to await officers from the accident prevention bureau, who, upon their arrival, accompanied plaintiff to the office of the city physician in the City Hall, where an X-ray was taken, and plaintiff was then driven to her home on the north side in Chicago. No point is made as to the amount of the verdict, and therefore it is not necessary to discuss the extent of plaintiff's injuries.

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Presumably Leonard did not blow the horn of his automobile, or he would have so stated. The evidence definitely shows that plaintiff was standing still about ten or twelve feet from the curb. Leonard was parked about six feet from the curb. If he looked out of the side of his car before backing, as he said in his testimony, it is difficult to perceive why he did not see plaintiff standing there. In any event, this evidence was submitted to the jury, and since it is not claimed by the city that Leonard sounded his horn before proceeding to back toward the curb on a busy thoroughfare, the jury was justified in finding that the city was negligent.

With respect to the city's contention that plaintiff was not in the exercise of due care for her own safety, it is argued that the provisions of the statute and municipal code should be taken into consideration. The point was not made on trial and no instructions were asked by defendant or given on the subject. It is a fair inference that plaintiff saw defendant's car standing still a short distance to the east of her, with the south side thereof about six feet from the curb, but since no signal was blown she had a right to assume that it would continue to stand there and she could not well anticipate that it would back up and hit her. There is positive evidence that she looked in both directions when she stopped in the street ten or twelve feet north of the south curb, and if she ^{saw} defendant's car standing still at that time, she had no cause to feel apprehensive about its backward movement without warning.

All these circumstances were submitted to the jury, and from a careful examination of the evidence, the essential portions of which have been set forth herein, we cannot say that the verdict of the jury was contrary to the manifest weight of the evidence. The cause was fairly tried, no complaint is made as to the amount of the verdict, and the judgment should therefore be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

Presumably Leonard did not blow the horn of his automobile, or he would have so stated. The evidence definitely shows that plaintiff was standing still about ten or twelve feet from the curb. Leonard was parked about six feet from the curb. If he looked out of the side of his car before backing, as he said in his testimony, it is difficult to perceive why he did not see plaintiff standing there. In any event, this evidence was submitted to the jury, and since it is not claimed by the city that Leonard sounded his horn before proceeding to back toward the curb on a busy thoroughfare, the jury was justified in finding that the city was negligent.

With respect to the city's contention that plaintiff was not in the exercise of due care for her own safety, it is argued that the provisions of the statute and municipal code should be taken into consideration. The point was not made on trial and no instructions were asked by defendant or given on the subject. It is a fair inference that plaintiff saw defendant's car standing still a short distance to the east of her, with the south side thereof about six feet from the curb, but since no signal was blown she had a right to assume that it would continue to stand there and she could not well anticipate that it would back up and hit her. There is positive evidence that she looked in both directions when she stopped in the street ten or twelve feet north of the south curb, and if she ^{saw} defendant's car standing still at that time, she had no cause to feel apprehensive about its backward movement without warning. All these circumstances were submitted to the jury, and from a careful examination of the evidence, the essential portions of which have been set forth herein, we cannot say that the verdict of the jury was contrary to the manifest weight of the evidence. The cause was fairly tried, no complaint is made as to the amount of the verdict, and the judgment should therefore be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Seaman, P. J., and Sullivan, J., concur.

41640

NICHOLAS NUDELMAN,
Plaintiff-Appellant,

v.

HARRY STERN,
Defendant-Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

THE NATIONAL BANK OF HYDE PARK,
a banking corporation,
Garnishee-Appellee.

380
315 I.A. 215'

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Nicholas Nudelman, procured a judgment by confession for \$4,369.49 against Harry A. Stern. Execution issued pursuant to said judgment was returned "no property found." Garnishment proceedings based on said judgment were instituted against the National Bank of Hyde Park as garnishee. The latter filed an answer setting forth that "It was and is indebted to Harry A. Stern *** in the sum of *** \$1,241.82;" and that "said indebtedness is now due and payable and its nature is that of a checking account joint with Lena F. Stern with this Garnishee." Trial was had by the court without a jury and a judgment order was entered which found the issues against the plaintiff and discharged the garnishee. This appeal followed.

Section 11 of the Garnishment act (chap. 62, Ill. Rev. Stat. 1939) reads as follows:

"If it appears that any goods, chattels, choses in action, credits or effects in the hands of a garnishee are claimed by any other person, by force of an assignment from the defendant, or otherwise, the court or justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served on him in such manner as the court or justice shall direct."

It will be noted that the garnishee's answer disclosed that the fund which it held on deposit was a checking account carried jointly in the names of Harry A. Stern and his wife, Lena F. Stern.

NICHOLAS WIDELMAN
Plaintiff-Appellant

v.

HARRY STERN,
Defendant-Appellee.

THE NATIONAL BANK OF HYDE PARK,
a banking corporation,
Garnishee-Appellee.

A TRIAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Nicholas Widelman, procured a judgment by com-
pensation for \$4,369.49 against Harry A. Stern. Execution issued

pursuant to said judgment was returned "no property found."

Garnishment proceedings based on said judgment were instituted
against the National Bank of Hyde Park as garnishee. The latter

filed an answer setting forth that "it was and is indebted to

Harry A. Stern *** in the sum of *** \$1,241.82;" and that "said

indebtedness is now due and payable and its nature is that of a

checking account joint with Lena F. Stern with this Garnishee."

Trial was had by the court without a jury and a judgment order
was entered which found the issues against the plaintiff and dis-

charged the garnishee. This appeal followed.

Section 11 of the Garnishment act (chap. 62, Ill. Rev.

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other person, by force of an assignment from the defendant, or
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claimant to appear and maintain his right. If he does not
voluntarily appear, notice for that purpose shall be issued and
served on him in such manner as the court or justice shall direct."

It will be noted that the garnishee's answer disclosed that

the fund which it held on deposit was a checking account carried
jointly in the names of Harry A. Stern and his wife, Lena F. Stern.

Stern, the judgment debtor, was present at the hearing and he was also represented by counsel. In a preliminary statement said counsel advised the trial court that "this money in the bank was a joint account of Mr. and Mrs. Stern *** Mrs. Stern is drastically ill *** it is her money." In answer to a question by the court as to whether Mrs. Stern was a necessary party plaintiff's attorney replied: "Yes, she is a necessary party and I want her here." Notwithstanding that the garnishee's answer and the statement of the judgment debtor's counsel disclosed to the court that Mrs. Stern claimed an interest in the bank account adverse to the rights of the judgment debtor and the judgment creditor, the court ordered the trial to proceed without the notice to her specified in the foregoing section of the Garnishment act. The action of the court in this regard constituted reversible error.

Section 11 of the Garnishment act is mandatory. It imposed the duty on the trial court of having notice issued and served upon Mrs. Stern "in such manner as the court or justice shall direct," since she was an adverse claimant to the funds garnisheed and had not appeared voluntarily in the proceeding. While section 11 was undoubtedly included in the Garnishment act to afford protection to an adverse claimant to the funds garnisheed who was disclosed as such by the answer of the garnishee or otherwise and who did not appear in the cause voluntarily as was the case here, it was also intended for the protection of the rights of the judgment creditor, since a judgment procured by the latter against the garnishee would be subject to reversal because of the trial court's failure to comply with the provisions of the section of the Statute heretofore set forth.

In Hamburg-Bremen Fire Ins. Co. v. Kennedy, 57 Ill. App. 136, wherein it appeared that various persons claimed the proceeds of an insurance policy and the trial court failed to have notice served

Stern, the judgment debtor, was present at the hearing and he was also represented by counsel. In a preliminary statement said counsel advised the trial court that "this money in the bank was a joint account of Mr. and Mrs. Stern *** Mrs. Stern is drastically ill *** it is her money." In answer to a question by the court as to whether Mrs. Stern was a necessary party plaintiff's attorney replied: "Yes, she is a necessary party and I want her here." Notwithstanding that the garnishee's answer and the statement of the judgment debtor's counsel disclosed to the court that Mrs. Stern claimed an interest in the bank account adverse to the rights of the judgment debtor and the judgment creditor, the court ordered the trial to proceed without the notice to her specified in the foregoing section of the Garnishment act. The action of the court in this regard constituted reversible error.

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In Hambro-Bremen Fire Ins. Co. v. Kennedy, 27 Ill. App. 136,

wherein it appeared that various persons claimed the proceeds of an insurance policy and the trial court failed to have notice served

upon such adverse claimants, the court said at pp. 138 and 139:

"Where the answer of a garnishee discloses parties and interests adverse to the rights of the execution debtor, than whom the garnishing creditor has no greater rights, it is the duty of the court, in order to protect the rights of such parties, to see that they are properly brought before the court so that the rights of all parties in interest may be adjudicated.

"Until that was done the cause was not in a condition to be heard, and it was error to force the appellant to a trial in their absence, when they were not notified to appear.

"The statute (sec. 11, ch. 62, entitled 'Garnishment') is express, that if the claimant disclosed by the answer of a garnishee does not voluntarily appear, he shall be notified to appear and maintain his right, in such manner as the court shall direct."

In Siegel v. Moses, 159 Ill. App. 624, the answer of the garnishee disclosed a claim by the Knoxville Woolen Mills to the funds garnisheed. There the court said at p. 625:

"The Knoxville Woolen Mills did not appear in the action nor was any notice of the proceeding given it. ***

"In our opinion notice should have been given the Knoxville Woolen Mills of the pendency of the proceedings in order that it might have an opportunity to assert and protect its rights, and until that was done the cause was not at issue and in a condition to be heard."

Thus notice to Lena A. Stern was jurisdictional in so far as any interest she might have in the fund garnisheed was concerned. Until she was given the notice specified in the statute "the cause was not at issue and in a condition to be heard" and no valid judgment could be entered in the garnishment proceeding in favor of the judgment creditor and against the garnishee. Under the statute the court was not obliged to compel Lena A. Stern to appear and participate in the garnishment proceedings, but it was its duty to see that she was served with notice of such proceedings so that she might appear if she saw fit to do so. The required statutory notice to an adverse claimant, who is disclosed as such by the answer of the garnishee and who does not appear voluntarily in the garnishment proceeding to assert his claim, is just as necessary to confer jurisdiction upon the court of the person of such adverse claimant as is the

upon such adverse claimants, the court said at pp. 138 and 139:

"Where the answer of a garnishee discloses parties and interests adverse to the rights of the execution debtor, then when the garnishing creditor has no greater rights, it is the duty of the court, in order to protect the rights of such parties, to see that they are properly brought before the court so that the rights of all parties in interest may be adjudicated.

"Until that was done the cause was not in a condition to be heard, and it was error to force the appellant to a trial in their absence, when they were not notified to appear.

"The statute (sec. 11, ch. 62, entitled 'Garnishment') is express, that if the claimant disclosed by the answer of a garnishee does not voluntarily appear, he shall be notified to appear and maintain his right, in such manner as the court shall direct."

In Stearns v. Moser, 129 Ill. App. 624, the answer of the garnishee disclosed a claim by the Knoxville Woolen Mills to the funds garnished. There the court said at p. 625:

"The Knoxville Woolen Mills did not appear in the action nor was any notice of the proceeding given it. **"

"In our opinion notice should have been given the Knoxville Woolen Mills of the pendency of the proceedings in order that it might have an opportunity to assert and protect its rights, and until that was done the cause was not at issue and in a condition to be heard."

Thus notice to Lena A. Stern was jurisdictional in so far as any interest she might have in the fund garnished was concerned. Until she was given the notice specified in the statute "the cause was not at issue and in a condition to be heard" and no valid judgment could be entered in the garnishment proceeding in favor of the judgment creditor and against the garnishee. Under the statute the court was not obliged to compel Lena A. Stern to appear and participate in the garnishment proceedings, but it was its duty to see that she was served with notice of such proceedings so that she might appear if she saw fit to do so. The required statutory notice to an adverse claimant, who is disclosed as such by the answer of the garnishee and who does not appear voluntarily in the garnishment proceeding to assert his claim, is just as necessary to confer jurisdiction upon the court of the person of such adverse claimant as it is

service of summons upon a defendant in any lawsuit to give the court jurisdiction of such defendant.

It appeared that Stern and his wife opened a joint checking account with the garnishee several years prior to the date of the service of the garnishment summons and that from time to time they both made deposits in the joint account and they both drew checks against same. Stern was called as a witness by the beneficial plaintiff and, while he was evasive and indefinite as to most of his testimony and stated that he was unable to remember facts concerning his personal business affairs and the account in question that the ordinary man could not well forget, he did admit that on August 12, 1940 he deposited in the account checks aggregating \$1,420.80, which represented income from his own business activities. There was a balance in the account of \$136.36 at the time this deposit was made. From August 12, 1940 to October 19, 1940, when the summons in garnishment was served, the total withdrawals from the account amounted to \$957.50. Some deposits were made during said period but, even though the aggregate withdrawals of \$957.50 were charged solely against the \$1,420.80 deposit made by Stern on August 12, 1940, which was admittedly his own money, there was still remaining in the account when the garnishment summons was served a minimum of \$463.26 belonging to Stern, which the beneficial plaintiff was entitled to recover from the garnishee. If Mrs. Stern had received the required statutory notice and the cause was properly at issue, the trial court should have entered a judgment in favor of plaintiff and against the garnishee for at least \$463.26. Because of the state of the record we are precluded from entering judgment here in favor of the beneficial plaintiff and against the garnishee for the \$463.26 in its hands, which admittedly belongs to Stern.

Stern was an adverse party in the original case and his interests continued to be adverse to plaintiff in this ancillary

service of summons upon a defendant in any lawsuit to give the

court jurisdiction of such defendant.

It appeared that Stern and his wife opened a joint checking

account with the garnishee several years prior to the date of the

service of the garnishment summons and that from time to time they

both made deposits in the joint account and they both drew checks

against same. Stern was called as a witness by the beneficial

plaintiff and, while he was evasive and indefinite as to most of

his testimony and stated that he was unable to remember facts con-

cerning his personal business affairs and the account in question

that the ordinary man could not well forget, he did admit that on

August 12, 1940 he deposited in the account checks aggregating

\$1,420.80, which represented income from his own business activities.

There was a balance in the account of \$136.36 at the time this deposit

was made. From August 12, 1940 to October 19, 1940, when the summons

in garnishment was served, the total withdrawal from the account

amounted to \$927.70. Some deposits were made during said period

but, even though the aggregate withdrawals of \$927.70 were charged

solely against the \$1,420.80 deposit made by Stern on August 12,

1940, which was admittedly his own money, there was still remaining

in the account when the garnishment summons was served a minimum of

\$463.26 belonging to Stern, which the beneficial plaintiff was

entitled to recover from the garnishee. If Mrs. Stern had received

the required statutory notice and the case was properly at issue,

the trial court should have entered a judgment in favor of plaintiff

and against the garnishee for at least \$463.26. Because of the state

of the record we are precluded from entering judgment here in favor

of the beneficial plaintiff and against the garnishee for the

\$463.26 in its hands, which admittedly belongs to Stern.

Stern was an adverse party in the original case and his

interests continued to be adverse to plaintiff in this ancillary

garnishment proceeding. The trial court should have permitted plaintiff to call Stern as a witness for cross-examination under section 60 of the Civil Practice Act (par. 184, chap. 110, Ill. Rev. Stat. 1939).

For the reasons stated herein the judgment order of the Municipal court of Chicago is reversed and the cause remanded with directions that proceedings be had not inconsistent with the views expressed herein and that the cause be retried.

JUDGMENT ORDER REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

earnishment proceedings. The trial court should have permitted plaintiff to call Stern as a witness for cross-examination under section 60 of the Civil Practice Act (par. 134, Chap. 110, Ill. Rev. Stat. 1939).

For the reasons stated herein the judgment order of the Municipal court of Chicago is reversed and the cause remanded with directions that proceedings be had not inconsistent with the views expressed herein and that the cause be retried.

JUDGMENT ORD R REV REMD AND
CAUSE REMANDD WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

41703

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Plaintiff,

v.

JANE M. BELL et al.,
Defendants.

MARGARET J. BELL,
Appellant,

v.

JANE M. BELL et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

315 I.A. 215²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Metropolitan Life Insurance Company, filed a complaint of interpleader against Jane M. Bell, Margaret J. Bell and L. T. Ellis Company, claimants to a fund in the hands of the insurance company. This fund represented the death benefit payable under a certificate of insurance issued by plaintiff on the life of Samuel J. Bell, an employee of Armour and Company. The certificate of insurance was issued under a group policy insuring the lives of Armour and Company employees. Answers were filed by Jane M. Bell and Margaret J. Bell setting forth their respective claims to the fund. The other defendant released plaintiff from any claim under the certificate and an order of default was entered as to it. Thereafter plaintiff made a motion for the entry of an interlocutory decree providing for the deposit with the clerk of the court of the interpleaded fund, less its court costs, and for the dismissal of plaintiff from the suit. This motion was denied on May 24, 1940, and at the time of the trial an order was entered finding that the complaint of interpleader was properly filed and directing plaintiff to pay the proceeds of the insurance to the clerk of the court to abide the further order of the court. December

41763

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Plaintiff,

v.

JANE M. DELL et al.,
Defendants.

MARGARET J. DELL,

v.

JANE M. DELL et al.,
Defendants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

317 M. 215

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Metropolitan Life Insurance Company, filed a complaint of interpleader against Jane M. Dell, Margaret J. Dell and J. T. Ellis Company, claimants to a fund in the hands of the insurance company. This fund represented the death benefit payable under a certificate of insurance issued by plaintiff on the life of Samuel J. Dell, an employee of Armore and Company. The certificate of insurance was issued under a group policy insuring the lives of Armore and Company employees. Answers were filed by Jane M. Dell and Margaret J. Dell setting forth their respective claims to the fund. The other defendant released plaintiff from any claim under the certificate and an order of default was entered as to it. Thereafter plaintiff made a motion for the entry of an interlocutory decree providing for the deposit with the clerk of the court of the interpleaded fund, less its court costs, and for the dismissal of plaintiff from the suit. This motion was denied on May 24, 1940, and at the time of the trial an order was entered finding that the complaint of interpleader was properly filed and directing plaintiff to pay the proceeds of the insurance to the clerk of the court to abide the further order of the court. December

10, 1940 a decree was entered finding that Jane M. Bell was entitled to the fund which had theretofore been deposited by the plaintiff with the clerk of the court. An additional amount of \$30.54, interest, was required to be deposited by the plaintiff with the clerk of the court under the terms of the decree, which was done. Defendant Margaret J. Bell appeals from the decree.

The appellant, Margaret J. Bell, contends that the trial court should have dismissed plaintiff's complaint of interpleader because the proper procedure was not followed in regard to same. This contention is without merit since it was not raised in apt time in the trial court and "where defendants interplead without objection and go to trial on the issues, it is too late to raise the objection" in the trial court or the reviewing court "that the cause is not a proper one for a bill of interpleader." (Woodmen of the World v. Rutledge, 133 Cal. 660.)

The material facts bearing upon the rights of the respective claimants to the proceeds of the insurance in question are undisputed.

Appellant, Margaret J. Bell, is the surviving widow of Samuel J. Bell, who died August 15, 1939. He had been theretofore married to Jane M. Bell on August 3, 1903 and divorced from her March 16, 1929. Bell was an employee of Armour and Company and was insured by plaintiff, Metropolitan Life Insurance Company, under the terms of its group life policy 3032-G for \$1,000. Certificate No. 13 was issued to the insured July 1, 1926, and in this certificate his then wife, Jane M. Bell, was named beneficiary. As already stated Jane M. Bell and Samuel J. Bell were divorced March 16, 1929. It appeared that the insured went to the home of Jane M. Bell on January 1, 1929 and requested all of his insurance policies and other papers, which she handed to him; and that he returned to her the original certificate of insurance involved in this proceeding, which he said she could keep as a New Year's gift. Jane M. Bell

10, 1940 a decree was entered finding that Jane M. Bell was entitled to the fund which had theretofore been deposited by the plaintiff with the clerk of the court. An additional amount of \$30.24, interest, was required to be deposited by the plaintiff with the clerk of the court under the terms of the decree, which was done. Defendant and Margaret J. Bell appeals from the decree.

The appellant, Margaret J. Bell, contends that the trial court should have dismissed plaintiff's complaint of interference because the proper procedure was not followed in regard to same. This contention is without merit since it was not raised in apt time in the trial court and "where defendants interplead without objection and go to trial on the issues, it is too late to raise the objection" in the trial court or the reviewing court "that the cause is not a proper one for a bill of interpleader." (Gooding of the World v. United States, 133 Cal. 660.)

The material facts bearing upon the rights of the respective claimants to the proceeds of the insurance in question are undisputed.

Appellant, Margaret J. Bell, is the surviving widow of Samuel J. Bell, who died August 15, 1939. He had been theretofore married to Jane M. Bell on August 3, 1903 and divorced from her March 16, 1929. Bell was an employee of American and Company and was insured by plaintiff, Metropolitan Life Insurance Company, under the terms of its group life policy 3032-3 for \$1,000. Certificate No. 13 was issued to the insured July 1, 1926, and in this certificate his then wife, Jane M. Bell, was named beneficiary. It already stated Jane M. Bell and Samuel J. Bell were divorced March 16, 1929. It appeared that the insured went to the home of Jane M. Bell on January 1, 1929 and requested all of his insurance policies and other papers, which she handed to him; and that he returned to her the original certificate of insurance involved in this proceeding, which he said she could keep as a New Year's gift. Jane M. Bell

had this certificate in her possession until after Bell's death. On February 23, 1937 Bell executed a request for a duplicate certificate of insurance, which he forwarded to the insurance company. He requested the issuance to him of a duplicate certificate of insurance under the same group policy, 3032-G, upon the grounds that the original certificate of insurance had been "lost or mislaid." He declared therein that he did not "know where such certificate now is, and I promise that if it shall come into my possession at any future time I will immediately surrender it to the Metropolitan Life Insurance Company." His request also contained this provision: "In consideration of the issuance of such duplicate certificate as herein requested, I hereby release the Metropolitan Life Insurance Company from any obligation under the original certificate above referred to." Jane M. Bell testified that the signature to the request was that of Samuel J. Bell, her former husband. The Metropolitan Life Insurance Company then issued the duplicate certificate of insurance requested by Bell. The following provision was stamped on the face of this certificate. "This certificate replaces any certificate issued on this life under group policy No. 3032-G prior to 2-23-37 and such prior certificates are void." Margaret J. Bell was named beneficiary in the duplicate certificate of insurance at Bell's request. A record card from the home office of the Metropolitan Life Insurance Company was received in evidence and it showed that Jane M. Bell was beneficiary under the original certificate of insurance issued to the insured and that in the duplicate certificate of insurance issued to Samuel J. Bell February 23, 1937 his beneficiary was changed to Margaret J. Bell, his then wife.

The real and the only question presented for determination on this appeal is which of the certificates of insurance was in force and which of the claimants was the legal beneficiary of the insured at the time of his death. Both the original and duplicate certificates of insurance contain a provision that "the right to change the

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and which of the claimants was the legal beneficiary of the insurance

at the time of his death. Both the original and duplicate certificates

of insurance contain a provision that "the right to change the

beneficiary is reserved" by the insured. The original policy also contained the following:

"REGISTER OF CHANGE OF BENEFICIARY
NOTE - ENTRIES IN THIS REGISTER ARE TO BE MADE ONLY
BY THE METROPOLITAN LIFE INSURANCE COMPANY
AT ITS HOME OFFICE IN NEW YORK. NO OTHER
ENTRIES WILL BE RECOGNIZED.

DATE
ENDORSED

BENEFICIARY

Defendant Jane M. Bell insists that under the foregoing provisions a change of beneficiary could not legally have been made which would affect her rights as beneficiary under the original policy unless such change was endorsed on said policy by the Metropolitan Life Insurance at its home office in New York. There is no doubt that where an insured has his insurance policy in his possession the method provided therein for changing his beneficiary should be followed and such change properly endorsed on the policy. But this method of changing the beneficiary in an insurance policy is not exclusive because it could not be followed if the insured did not have the policy in his possession. The evidence that the decedent made a gift of the policy to Jane M. Bell January 1, 1929 just prior to her divorce from him is immaterial as is the evidence submitted by her to the effect that the insurance company might have readily ascertained, if it had made a proper investigation, that she had the policy in her possession. Whether Bell went through the form of making a gift of the certificate to Jane or whether it came into her possession in some other manner, she had no vested right in the certificate of insurance or the proceeds thereof unless she was his lawful beneficiary at the time of his death. Under the circumstances shown herein the only right of Jane M. Bell under the original certificate of insurance was a mere expectancy, which could be defeated through the power of the insured to change her designation as

beneficiary is reserved" by the insured. The original policy also contained the following:

"RECEIPT OF CHANGE OF BENEFICIARY
NOTE - ENTRIES IN THIS REGISTER ARE TO BE MADE ONLY
BY THE METROPOLITAN LIFE INSURANCE COMPANY
AT ITS HOME OFFICE IN NEW YORK. NO OTHER
ENTRIES WILL BE RECOGNIZED."

ENDORSED	DATE	BENEFICIARY

Defendant Jane E. Bell insists that under the foregoing provisions a change of beneficiary could not legally have been made which would affect her rights as beneficiary under the original policy unless such change was endorsed on said policy by the Metropolitan Life Insurance at its home office in New York. There is no doubt that where an insured has his insurance policy in his possession the method provided therein for changing his beneficiary should be followed and such change properly endorsed on the policy. But this method of changing the beneficiary in an insurance policy is not exclusive because it could not be followed if the insured did not have the policy in his possession. The evidence that the defendant made a gift of the policy to Jane E. Bell January 1, 1929 just prior to her divorce from him is established as is the evidence admitted by her to the effect that the insurance company might have readily ascertained, if it had made a proper investigation, that she had the policy in her possession. In that Bell went through the form of making a gift of the certificate to Jane or whether it came into her possession in some other manner, and had no vested right in the certificate of insurance or the proceeds thereof unless she was the actual beneficiary at the time of his death. Under the circumstances shown herein the only right of Jane E. Bell under the original certificate of insurance was a mere expectancy, which could be defeated through the power of the insured to change her designation as

beneficiary. (Mayer v. Ill. Life Ins. Co., 211 Ill. App. 285.)

It must be remembered that Bell made his request for the issuance of the duplicate policy and the change of beneficiary about eight years after his divorce from Jane. The asserted delivery of the certificate to her as a gift did not and could not constitute a waiver of the reserved right of the insured to change the beneficiary, since she had no vested interest in the insurance contract and was not a party thereto. During the entire life of his insurance certificate the insured, under the terms thereof, had the absolute right to change his beneficiary. Even in the absence of a provision from an insurance policy to that effect, it is the recognized custom and established practice in the insurance field for an insurance company to issue a duplicate policy when same is applied for by an insured because the original policy is lost or mislaid. Bell admittedly did not have the original certificate in his possession for eight years and it might well have been that he did not remember what had become of it. In our opinion, even though both Bell and the insurance company knew that Jane had the original policy in her possession, the insured still had the right to request and receive a duplicate certificate designating another beneficiary.

Bell and the insurance company were the only parties in interest to the original certificate of insurance and they had the right to agree to substitute a new certificate therefor, in view of the fact that Bell's right to change his beneficiary was reserved to him in said original certificate. By reason of Bell's reserved right to change his beneficiary and of his statement to the company that the original certificate had been "lost or mislaid" the insurer was bound to issue the duplicate certificate to him. Bell's request for the duplicate certificate and the issuance of same by the insurer in response to said request resulted in the extinguishment of the

beneficiary, (Exor v. Ill. Life Ins. Co., 11 Ill. App. 255.)

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issuance of the duplicate policy and the change of beneficiary

about eight years after his divorce from Jane. The asserted

delivery of the certificate to her as a gift did not and could

not constitute a waiver of the reserved right of the insured to

change the beneficiary, since she had no vested interest in the

insurance contract and was not a party thereto. During the entire

life of his insurance certificate the insured, under the terms

thereof, had the absolute right to change his beneficiary. Even

in the absence of a provision from an insurance policy to that

effect, it is the recognized custom and established practice in the

insurance field for an insurance company to issue a duplicate policy

when same is applied for by an insured because the original policy

is lost or mislaid. Bell admittedly did not have the original certi-

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that he did not remember what had become of it. In our opinion, even

though both Bell and the insurance company knew that Jane had the

original policy in her possession, the insured still had the right to

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to him in said original certificate. By reason of Bell's reserved

right to change his beneficiary and of his statement to the company

that the original certificate had been "lost or mislaid" the company

was bound to issue the duplicate certificate to him. Bell's request

for the duplicate certificate was the issuance of same by the insurer

in response to said request provided in the endorsement of the

original certificate and the change of beneficiary. Jane had no right or interest in the original certificate that entitled her to notice of the change of beneficiary and if she had received notice there was nothing that she could have done to prevent such change.

Since Bell had the right to change his beneficiary, regardless of the whereabouts of the original certificate, and since same was not in his possession, he had the right to treat it as "lost or mislaid" and the insurance company did the only thing that it properly could have done under the circumstances in issuing the duplicate certificate.

Counsel for Jane M. Bell calls our attention to paragraph 841 (3), section 229, chapter 73 Ill. Rev. Stat. 1939, and states in the argument in her brief and also stated upon oral argument that said section of the Insurance Code precludes and prohibits a change of beneficiary otherwise than by proper indorsement thereof on the insurance policy or certificate itself. It is difficult to understand how this argument could have been made with any degree of sincerity. A mere glance at section 229, paragraph 841 (3) of the Insurance Code shows that the provisions of said section are applicable only to Industrial Life Insurance and Industrial Life Insurance is defined in the preceding paragraph (840) of the Insurance Code as follows:

"As used in this Code 'industrial life insurance' means either that form of life insurance under which the premiums are payable weekly, or that under which premiums are payable monthly or oftener if the face amount of insurance provided in the policy is less than one thousand dollars and the words 'industrial policy' are printed in prominent type on the face of the policy."

The certificates of insurance involved herein are not Industrial Life Insurance policies. Moreover, although paragraph 841 (3) is inapplicable to the certificates of insurance in question here, there is no provision in said paragraph that prohibits an insured from changing his beneficiary by the method employed in

original certificate and the change of beneficiary. Jane had no right or interest in the original certificate that entitled her to notice of the change of beneficiary and if she had received notice there was nothing that she could have done to prevent such change.

Since Bell had the right to change his beneficiary, regardless of the whereabouts of the original certificate, and since same was not in his possession, he had the right to treat it as "lost or mislaid" and the insurance company as the only thing that it properly could have done under the circumstances in issuing the duplicate certificate.

Counsel for Jane W. Bell calls our attention to paragraph 841 (3), section 229, chapter 73 Ill. Rev. Stat. 1939, and states in the argument in her brief and also stated upon oral argument that said section of the Insurance Code prescribes and prohibits a change of beneficiary otherwise than by proper endorsement thereon on the insurance policy or certificate itself. It is difficult to understand how this argument could have been made with any degree of sincerity. A mere glance at section 229, paragraph 841 (3) of the Insurance Code shows that the provisions of said section are applicable only to Industrial Life Insurance and Industrial Life Insurance is defined in the preceding paragraph (840) of the Insurance Code as follows:

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The certificates of insurance involved herein are not Industrial Life Insurance policies. However, although paragraph 841 (3) is inapplicable to the certificates of insurance in question here, there is no provision in said paragraph that prohibits an insured from changing his beneficiary by the method employed in

this case, where the circumstances warrant the use of such method.

In the recent case of Immel v. Travelers Insurance Co., 373 Ill. 256, our Supreme court in passing upon the right of an insurance company to pay the proceeds of a duplicate insurance policy to the beneficiary named therein, used the following language at pp. 262, 263:

"It is essential to the prompt payment of losses that life insurance contracts be denied negotiability, and prompt payment of losses has come to be one of the most desirable of the attributes of such contracts. Life insurance is depended on for the payment of estate taxes, for the education of children, for all forms of immediate cash demands and for the very living of the family of the deceased policyholder pending administration. Any impairment of this vital feature of the most general American contract would be of serious consequences to millions of people, and yet this very thing would result from any conclusion different from that which we have arrived at. Under the law, there is no reason why duplicate contracts may not be issued as the convenience of the policyholder may require. If, however, it should be held that these contracts are negotiable or transferable without notice, then the companies will, of very necessity, require a substantial bond for replacement. If a company must pay at its peril, with the ever-present possibility of secret liens, or that another policy may be outstanding, then come the dangers of forgery, theft and other frauds, and against these there would be little possibility of protection. Even by interpleader, it would be impossible to know who should be made parties. We believe that the only safe course is to continue to hold, as we do, that these policies are not negotiable, that they are not contracts but merely evidence of contracts, and that the companies, in good faith, may safely pay promptly to those shown by their own records to be entitled to payment."

The only question we are called upon to decide is whether the trial court properly applied the law to the undisputed facts. We are impelled to hold that the trial court erred in its application of the law.

In our opinion defendant Margaret J. Bell, the beneficiary named in the duplicate certificate, is clearly entitled to receive the proceeds of such policy plus interest at the legal rate up to the time such proceeds were deposited with the clerk, and minus such costs as plaintiff is entitled to receive.

For the reasons stated herein the decree of the Circuit court is reversed and the cause is remanded with directions to enter a decree consistent with the views expressed herein.

REVERSED AND REMANDED WITH
DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

this case, where the other cases were not, it was not stated,

In the report given to the President of the Council of Ministers, the following points are mentioned:

383 III. 252, our copy in the library of the

insurance company to pay the proceeds of a judgment therefor.

policy to the beneficiary named therein, and the following

Language at pp. 205, 203:

[illegible]

The only question we are called upon to decide is whether the trial court properly applied the law to the undisputed facts. We are not called upon to hold that the trial court was in its application of the law.

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Scanned, P. J., and Friend, J., General,
Washington, D.C.
WASHINGTON, D.C.
is reversed and the cause is removed with disposition to enter a
degree consistent with the views expressed herein.

For the reasons stated herein the Bureau of the District Court

42319

CHICAGO TITLE AND TRUST COMPANY, a)
Corporation, as Trustee in Trust)
Deed recorded as Document No.)
9253379,)

v.)

DOLLIE F. LEITCH, et al.,)

JAMES J. BARBOUR,
Appellant,)

FRANK A. SLOAN, Receiver,
Appellee.)

315 Ill. App.
Abstract
INTERLOCUTORY APPEAL
FROM CIRCUIT COURT,
COOK COUNTY.

149
315 I.A. 235

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal James J. Barbour seeks to reverse an order of the Circuit court of Cook county entered April 21, 1942, restraining and enjoining him from interfering with the peaceful possession of Frank A. Sloan, receiver, appointed in a foreclosure suit.

The record discloses that March 25, 1942, James J. Barbour by leave of court, filed his verified petition setting up that the property was sold by a master in chancery March 19, 1941, pursuant to a decree of foreclosure; that the report of sale filed by the master was confirmed showing the property had been sold for \$1,796.75; that after the sale the owners of the equity of the property, conveyed it by quit-claim deed to Barbour March 14, 1942, and afterward Barbour redeemed from the foreclosure sale by paying the master the amount due, viz., \$1,903.66, and a certificate of redemption was issued to him by the master; that after making the redemption, Barbour caused notice to be served on the attorneys of record in the cause and the prayer of the petition was that the receiver be ordered to surrender and deliver up possession of the premises forthwith to Barbour and pay to him all rents received by the receiver after March 16, 1942, and that the receiver be required to file his final account.

CHICAGO TITLE AND TRUST COMPANY
Corporation, as Limited in Trust
Deed recorded as Instrument No.
2223320,

v.

BOHLE E. LEE, et al.,

JAMES J. HANCOCK,
Defendant,

FRANK A. HANCOCK, et al.,
Defendants.

IN TESTIMONY WHEREOF, the within and other

By this report dated 2. 1942, which refers to records in relation
of the district court of Cook County entered March 1, 1942,
restoring and maintaining his true interest in the property
possession of Frank A. HANCOCK, deceased, entered in a foreclosure
suit.

The record discloses that March 22, 1928, James J. HANCOCK
by leave of court, filed his verified petition setting up that
the property was sold by a master in execution March 10, 1928,
pursuant to a decree of foreclosure; that the result of said
filed by the master was confirmed showing the property had been
sold for \$1,700.00; that after said sale the owners of the property
of the property, conveyed it by quit-deed back to HANCOCK March
12, 1942, and afterward HANCOCK conveyed the same from the foreman/sale
sale by paying the master the amount due, viz., \$1,500.00, and a
certificate of redemption was issued to him by the master; that
after making the redemption, HANCOCK caused notice to be served
on the attorneys of record in the cause and the master of the
petition was that the receiver be ordered to surrender and deliver
up possession of the premises therein to HANCOCK and pay to
him all moneys received by the receiver after March 12, 1942, and
that the receiver be required to file his final account.

Admitted

James J. HANCOCK

James J. HANCOCK

JOHN HANCOCK

177

31214 222

On the same day, and as a part of the order giving Barbour leave to file the petition, the receiver was given leave to answer or move to dismiss the petition within 10 days and the matter was placed on the contested motion calendar for March 27, 1942, when it was ordered that the court set a date for hearing the matter. Two days thereafter, another order was entered reciting the matter came on to be heard on the contested motion calendar, and it was ordered that the cause be set for trial May 21, at 2 P.M.

April 21, the receiver filed his petition in which he set up that he had been appointed and qualified August 23, 1935, and had been acting as receiver of the property since that time. And it was averred that Barbour was interfering with the petitioner's peaceful possession by serving written demands on the tenants to pay rent to Barbour. The prayer of the receiver's petition was that an order be entered commanding Barbour to desist from interfering with the possession of the receiver and from making demands on the tenants to pay rent. On the same day, April 21, Barbour filed his answer to the receiver's petition in which he denied interfering with the peaceful possession of the receiver but averred he had learned that a certain concern was in possession of the garage located on the premises, claiming to occupy it as a tenant of the receiver and that thereupon he served notice on the tenant. The notice which is made a part of the answer sets up the redemption of the property by Barbour and notifies the tenant that the receiver had no authority to make any lease of the premises, which would extend beyond the time when the redemption was made, and that if the tenant should continue to occupy part of the premises until such date, the tenant would be treated as a tenant for 9 months from the date of redemption at a rental of \$10,000 for the 9 months, payable in advance and that if the tenant desired to occupy the premises as Barbour's tenant for a longer period to consult the latter's attorney.

On the same day, and as a part of the same proceedings, the receiver was ordered to leave to file the petition, the receiver was also ordered to move to dismiss the petition within 10 days and was ordered to be placed on the contested motion calendar for March 17, 1935, when it was ordered that the court set a day for hearing the matter. Two days thereafter, another order was entered reciting the matter came on to be heard on the contested motion calendar, and it was ordered that the case be set for trial May 11, at 2 P.M. April 11, the receiver filed his petition in which he set up that he had been appointed and qualified January 22, 1935, and had been acting as receiver of the property since that time. And it was averred that Harbor was interfering with the receiver's peaceful possession by serving written demands on the receiver to pay rent to Harbor. The prayer of the receiver's petition was that an order be entered compelling Harbor to desist from interfering with the possession of the receiver and from making demands on the tenants to pay rent. On the same day, April 11, Harbor filed his answer to the receiver's petition in which he denied interfering with the peaceful possession of the receiver but averred he had learned that a certain company was in possession of the premises located on the premises, claiming to occupy it as a tenant of the receiver and that thereupon he served notice on the tenant. The notice which he made a part of the answer sets up the redemption of the property by mortgage and notifies the tenant that the receiver had no authority to make any lease of the premises, which would extend beyond the time when the redemption was made, and that if the tenant should continue to occupy part of the premises until such date, the tenant would be treated as a tenant for 9 months from the date of redemption at a rental of \$15,000 for the 9 months, payable in advance and that if the tenant failed to occupy the premises as Harbor's tenant for a longer period to consult the latter's attorney.

The answer further set up the redemption of the property by Barbour and that "Under the law, the rights of the said Receiver to possession of said real estate would terminate at the expiration of June 19, 1942, in the absence of any redemption from said foreclosure sale," and it was further alleged in the answer that there was pending and undecided, Barbour's petition filed in the proceeding to which we have above referred, in which it was sought to have the receiver turn over immediate possession to Barbour "and in said petition is involved for decision of this court the question of whether this respondent became entitled to possession of said premises immediately upon making the said redemption, or whether the right of this respondent to said possession will begin June 20, 1942," and that the receiver had no right to have an order entered enjoining Barbour, as requested in the receiver's petition. On the same day the order appealed from was entered and 8 days thereafter, April 29, Barbour filed his notice of appeal.

Counsel for Barbour contends that the notice served by Barbour on the tenant did not interfere with the receiver's position and that even if it were held that a demand for rent had been made on the tenant immediately after the redemption, such demand would have been proper "for the receiver's right ceased with a redemption made within one year after the foreclosure sale, leaving no further right of redemption."

We think these matters are not properly before us. They are pending in the trial court. Barbour had filed a petition to which we have above referred. It was undisposed of and whether the receiver had answered or moved to strike does not appear from the record. We think those matters should have been disposed of by the trial judge, and there was no error in enjoining Barbour until such disposition had been made.

The order of the Circuit court appealed from is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

The answer further set up the redemption of the property by Barbour and that "under the law, the rights of the said receiver to possession of said real estate would terminate at the expiration of June 19, 1947, in the absence of any redemption from said foreclosing sale," and it was further alleged in the answer that there was pending and unpaid, Barbour's petition filed in the proceeding to which we have above referred, in which it was sought to have the receiver turn over immediate possession to Barbour "and in said petition is involved the question of this court the question of whether this respondent is entitled to possession of said premises immediately upon making the said redemption, or whether the right of this respondent to said redemption will begin June 20, 1947," and that the receiver had no right to have an order entered enjoining Barbour, as requested in the receiver's petition. On the same day the order requested from was entered and 8 days thereafter, April 19, Barbour filed his notice of appeal.

Counsel for Barbour contends that the notice served by Barbour on the tenant did not interfere with the receiver's position and that even if it were held that a demand for rent had been made on the tenant immediately after the redemption, such demand would have been proper "for the receiver's right ceased with a redemption made within one year after the foreclosure sale, leaving no further right of redemption."

We think these matters are not properly before us. They are pending in the trial court. Barbour had filed a petition to which we have referred. It was undisputed at the hearing that the receiver had answered or moved to strike same and appear from the record. We think those matters should have been determined by the trial judge, and there was no error in refusing to grant until such determination had been made.

The order of the district court was affirmed.

ORDER AFFIRMED.

RECEIVED, E. J., and No. 121, 611, 1947.

42043

BROOKSON DISTILLERS, INC.,
a corporation,
Appellee,

v.

UNITED STATES CASUALTY COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

315 I.A. 235

44
153

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment for \$267.63 in an action tried by the court upon a combination robbery (hold-up) insurance policy issued by it to the plaintiff.

On May 6, 1938, plaintiff was engaged in the wholesale liquor business in Chicago; it had in its employ one Charles Brooks, whose duties consisted in selling merchandise and making collections; during the course of his employment he was held up and money and checks amounting to \$267.63 and his automobile were taken from him.

Defendant says it is not liable because the loss did not occur within the hours of employment covered by the policy, and cites a provision which covers an "outside messenger" (such as Brooks) between the "hours 7 A.M. to 12 midnight." Defendant says the robbery took place after 12 midnight on the morning of May 7, and hence not covered by the policy.

Brooks testified that the robbery occurred at 11:35 P.M. daylight saving time on the evening of May 6, 1938, and described the robbery in detail; that he called the police and went in their squad car to the station, and that it was about 12 o'clock when he got to the station; that from there he telephoned to his "boss," Mr. Leavitt. Leavitt confirms this, saying that he received the telephone call from Brooks a little after 12 - maybe 12:15. Against this is the testimony of a number of persons connected with the police department to the effect that they were notified by phone of the robbery about 12:31 A.M. A printed and written

BROOKS DISTILLERY, INC.,
a corporation,
Appellee.

v.

UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA,
Appellant.

MR. JUSTICE HOLMES delivered the opinion of the court.

Defendant appeals from an adverse judgment for \$257.63 in an action tried by the court upon a combination robbery (hold-up) insurance policy issued by it to the plaintiff.

On May 6, 1933, plaintiff was engaged in the wholesale liquor business in Chicago; it had in its employ one Charles Brooks, whose duties consisted in selling merchandise and making collections; during the course of his employment he was held up and money and checks amounting to \$257.63 and his automobile were taken from him.

Defendant says it is not liable because the loss did not occur within the hours of employment covered by the policy, and cites a provision which covers an "outside messenger" (such as Brooks) between the "hours 7 A.M. to 12 midnight." Defendant says the robbery took place after 12 midnight on the evening of May 7, and hence not covered by the policy. Brooks testified that the robbery occurred at 11:15 P.M. daylight saving time on the evening of May 6, 1933, and that the robbery in detail; that he called the police and went in their squad car to the station, and that it was about 12 o'clock when he got to the station; that from there he telephoned to his home, Mr. Leavitt. Leavitt confirms this, saying that he received the telephone call from Brooks a little after 12 - maybe 12:15. Against this is the testimony of a number of persons connected with the police department to the effect that they were notified by phone of the robbery about 12:15 A.M. A detailed and written

report of this complaint was introduced in evidence which purports to show that the call was received May 7 at 12:31, but the effect of this is weakened by the document, which clearly shows that the time first noted when the report was received was 11:31 P. M., and that this was subsequently changed to read 12:31 A. M.

However this may be, the trial judge heard the witnesses and can better judge of the weight to be given their testimony than can we. We should not disturb this conclusion unless it is against the manifest weight of the evidence. City of Quincy v. Kemper, 304 Ill. 303.

It is admitted that there was in force in the City of Chicago at this time what is termed a "daylight saving time" ordinance, which, during the summer months, advances the time one hour beyond standard time. Plaintiff makes the point that the policy says that the time covered is "standard time," and that if, as the police department testified, the loss occurred about 12:30 daylight saving time, this would be the same as one hour earlier, or 11:30 standard time, hence covered by the policy. It is well settled that if there is any ambiguity in an insurance policy, that construction will be adopted which favors the insured. Joseph v. New York Life Ins. Co., 308 Ill. 93.

The court could properly conclude that even if the holdup occurred at 12:30 midnight, daylight saving time, this would be 11:30 standard time, hence covered by the policy.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

report of this complaint was introduced in evidence which purports to show that the call was received May 7 at 12:31, but the effect of this is weakened by the document, which clearly shows that the time first noted when the report was received was 11:31 P. M., and that this was subsequently changed to read 12:31 A. M.

However this may be, the trial judge heard the witnesses and can better judge of the weight to be given their testimony than can we. We should not disturb this conclusion unless it is against the manifest weight of the evidence. City of Quincy v. Kenney, 304 Ill. 303.

It is admitted that there was in force in the city of Chicago at this time what is termed a "daylight saving time" ordinance, which, during the summer months, advances the time one hour beyond standard time. Plaintiff makes the point that the policy says that the time covered is "standard time," and that if, as the police department testified, the loss occurred about 12:30 daylight saving time, this would be the same as one hour earlier, or 11:30 standard time, hence covered by the policy. It is well settled that if there is any ambiguity in an insurance policy, that construction will be adopted which favors the insured. Joseph v. New York Life Ins. Co., 308 Ill. 83.

The court could properly conclude that even if the policy occurred at 12:30 daylight saving time, this would be 11:30 standard time, hence covered by the policy. For the reasons indicated the judgment is affirmed.

APPROVED:

Matchett, P. J., and O'Connell, J., concur.

42068

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. AUBREY G. O'KELLEY,
Appellee,

315 I.A. 236

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JAMES P. ALLMAN, Commissioner of
Police of the City of Chicago,
JOSEPH P. GEARY, WENDELL E. GREEN
and JOHN E. BRENNAN, Civil Service
Commissioners of the City of Chicago,
and ROBERT B. UPHAM, Comptroller of
the City of Chicago,
Appellants.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Aubrey G. O'Kelley filed his petition for a writ of mandamus against defendants asking that he be restored to his position in the classified service of the Department of Police of the City of Chicago; defendants filed an answer which on motion was held by the trial court insufficient to constitute a defense to the prayer of plaintiff's petition and the writ was awarded, and defendants appeal.

Defendants first argue that mandamus does not lie to review the action of the civil service commission, citing People ex rel. Asberly v. City of Chicago, 240 Ill. App. 208 (certiorari denied by the Supreme court.) In that opinion we noted that writs of mandamus and certiorari have both been used for the purpose of reinstating one who has been removed from office illegally. Subsequently, in People ex rel. Mitchell v. City of Chicago, 243 Ill. App. 100, we held that both certiorari and mandamus may be used as remedies in such cases, and we have repeated this conclusion in the recent case of People ex rel. Sweeney v. Allman, No. 41945, opinion filed June 1, 1942.

The petitioner charged that he was duly certified and appointed on August 16, 1935 a patrolman in the classified service of the department of police of Chicago; that he performed his duties properly; that on April 24, 1940 charges were made against

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. AUBREY G. O'KELLEY,
Appellee,

JAMES P. ALLMAN, Commissioner of
Police of the City of Chicago,
JOSEPH P. GLAY, WENDLE B. GLAY,
and JOHN E. BARNES, Civil Service
Commissioners of the City of Chicago,
and ROBERT B. UPHAM, Comptroller of
the City of Chicago,
Appellants.

OF THE COURT,
CIVIL DIVISION.

MR. JUSTICE ROBERTS delivered the opinion of the court.

Aubrey G. O'Kelley filed his petition for a writ of mandamus against defendants asking that he be restored to his position in the classified service of the Department of Police of the City of Chicago; defendants filed an answer which on motion was held by the trial court insufficient to constitute a defense to the prayer of plaintiff's petition and the writ was awarded, and defendants appeal.

Defendants first argue that mandamus does not lie to review the action of the civil service commission, citing People ex rel. Aubrey v. City of Chicago, 240 Ill. App. 408 (certiorari denied by the Supreme Court). In that opinion we noted that writs of mandamus and certiorari have both been used for the purpose of reinstating one who has been removed from office illegally. Subsequently, in People ex rel. Mitchell v. City of Chicago, 243 Ill. App. 100, we held that both certiorari and mandamus may be used as remedies in such cases, and we have repeated this conclusion in the recent case of People ex rel. Weeney v. Allman, No. 41945, opinion filed June 1, 1945.

The petitioner charged that he was duly certified and appointed on August 16, 1935 a patrolman in the classified service of the department of police of Chicago; that he performed his duties properly; that on April 22, 1944 charges were made against

him and May 10 he was found guilty as charged and an order was entered discharging him. The petition alleged, among other things, that the civil service commission did not specifically set forth the facts alleged to constitute cause for removal and did not proceed legally in the matter and therefore was without jurisdiction to order his discharge.

Section 1, rule 6 of the rules of the civil service commission provide that the charges filed "shall state specifically the facts" alleged to constitute the cause for discharge. The charges filed against plaintiff were: "Section 3. Conduct unbecoming a police officer or employee of the police department. Section 5. Neglect of Duty. Section 10. Incapacity or inefficiency in the service. Section 22. Making a false official report." The specifications attached merely repeated these charges, giving the date as March 27, 1940, when O'Kelley was said to have been guilty. The commission found plaintiff guilty of 2 of these charges, namely (1) neglect of duty and (2) incapacity or inefficiency in the service.

It is obvious that these general charges did not follow the rules of the commission, which require that such charges "shall state specifically the facts." Defendants say that plaintiff knew with what he was charged. This is virtually a confession that the charges did not follow the commission's rules. Under such circumstances the accused person is entitled to know specifically what the charges are and not left to conjecture as to what these may be. In Ptacek v. The People, 94 Ill. App. 571, 576, it was held that while the board of commissioners had power to change its rules "they did not have power to disregard them while they remained in force and effect and unchanged." To the same effect is City of Chicago v. Bullis, 124 Ill. App. 7, 17, and cases there cited.

him and say to him that he was found guilty as charged and an order was entered discharging him. The petition alleged, among other things, that the civil service commission did not specifically set forth the facts alleged to constitute cause for removal and did not proceed legally in the matter and therefore was without jurisdiction to order his discharge.

Section 1, rule 6 of the rules of the civil service commission provide that the charges filed "shall state specifically the facts" alleged to constitute the cause for discharge. The charges filed against plaintiff were: "Section 3. Conduct unbecoming a police officer or employee of the police department. Section 5. Neglect of duty. Section 10. Incompetency or inefficiency in the service. Section 22. Making a false official report." The specifications attached merely repeated these charges, giving the date as March 27, 1944, when O'Reilly was said to have been guilty. The commission found plaintiff guilty of 2 of these charges, namely (1) neglect of duty and (2) incompetency or inefficiency in the service.

It is obvious that these general charges did not follow the rules of the commission, which require that such charges "shall state specifically the facts." Defendants say that plaintiff knew with what he was charged. This is virtually a confession that the charges did not follow the commission's rules. Under such circumstances the accused person is entitled to know specifically what the charges are and not left to conjecture as to what they may be. In Packer v. The People, 4 Ill. App. 271, 272, it was held that while the board of commissioners had power to change its rules "they did not have power to disregard the rules they remained in force and effect and unamended." To the same effect is City of Chicago v. Willis, 124 Ill. App. 2, 17, and cases there cited.

Cases cited by defendants in opposition are not controlling. In Joyce v. City of Chicago, 216 Ill. 466, where the charge was made that two members of the police force had rendered a false expense account, the amount of the excess is specified. The facts are plainly stated, setting forth the charges. The same may be said of Heaney v. City of Chicago, 117 Ill. App. 405, where the negligence and incompetency were specified.

Defendants argue that even if its charges were not specific, plaintiff waived the objection by participating in the hearing before the commission. If the charges stated no cause for removal the commission has no jurisdiction and plaintiff waived no rights. It should be remembered that the trial court was not called upon to pass upon the proceedings before the commission, but held that because of the insufficiency in law of defendants' answer the writ should be awarded.

The trial court properly struck certain sub-paragraphs of defendants' answer. These paragraphs were statements made to the police department and were taken at a time before any written charges against plaintiff had been filed.

Defendants' answer clearly showed that the commission had not followed its rules in the matter, and therefore the court properly held that its answer was insufficient and that plaintiff was entitled to the writ. The judgment of the Circuit court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

Cases cited by defendants in opposition are not controlling. In Loose v. City of Chicago, 216 Ill. 466, where the court made that two members of the police force had rendered a false expense account, the amount of the excess is specified. The facts are plainly stated, setting forth the charges. The same may be said of Healey v. City of Chicago, 117 Ill. 401, 402, where the negligence and incompetency were specified.

Defendants argue that even if the charges were not specific, plaintiff waived the objection by participating in the hearing before the commission. If the charges stated no cause for removal the commission has no jurisdiction and plaintiff waived no rights. It should be remembered that the trial court was not called upon to pass upon the proceedings before the commission, but held that because of the insufficiency in law of defendants' answer the writ should be awarded.

The trial court properly struck certain allegations of defendants' answer. These answers were statements made to the police department and were taken at a time before any written charges against plaintiff had been filed. Defendants' answer clearly showed that the commission had not followed the rules in its action, and therefore the court properly held that its answer was insufficient and that plaintiff was entitled to the writ. The judgment of the Circuit Court is affirmed.

APPROVED:

WATSON, J. J., and O'CONNOR, J., concur.

42039

315 I.A. 237¹

COLONIAL VILLAGE RESTAURANTS, INC.
(Howard M. Fox substituted as plain-
tiff),

Appellee,

v.

COLONIAL VILLAGE, INC. (Joseph H.
Beuttas substituted as defendant),
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant claiming \$2,706.31 which was made up of two items, viz., \$1,716.53, which plaintiff claimed defendant had wrongfully withheld, and \$989.78, due plaintiff under a settlement agreement entered into between the parties August 4, 1934. On the other hand, defendant's position was that it had properly withheld the amount plaintiff claimed and that while defendant owed plaintiff the \$989.78, as against this, plaintiff owed defendant \$872, and another item of \$169.29, or a total of \$1,041.29, leaving a balance due defendant of \$51.51. A number of the facts were stipulated and it was further stipulated that the liability of defendant, if any, should in no event exceed \$1,500. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for \$1,500 and defendant appeals.

The record discloses that defendant, Colonial Village, Inc., had a contract with A Century of Progress and May 7, 1934, defendant entered into a contract with Howard M. Fox, whereby Fox was to operate three restaurants located in the Colonial Village of the Fair Grounds. May 16, Fox assigned the contract to plaintiff, Colonial Village Restaurants, Inc. After the Fair opened, which was the latter part of May, 1934, plaintiff operated the three restaurants located in the Colonial Village until July 25, 1934, when defendant took possession and thereafter operated them until the close of the Fair, October 31, 1934.

COLONIAL VILLAGE RESTAURANTS, INC.
(Howard Fox substituted as plain-
tiff),

Appellee,

v.

COLONIAL VILLAGE, INC. (Joseph H.
Bentley substituted as defendant),
Appellant.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against defendant claiming \$2,709.31 which was made up of two items, viz., \$1,716.32, which plaintiff claimed defendant had wrongfully withheld, and \$993.99, the plaintiff under a settlement agreement entered into between the parties August 4, 1934. On the other hand, defendant's position was that it had properly withheld the amount plaintiff claimed and that while defendant owed plaintiff the \$993.99, as against this, plaintiff owed defendant \$872, and another item of \$183.29, or a total of \$1,041.29, leaving a balance due defendant of \$21.81. A number of the facts were stipulated and it was further stipulated that the liability of defendant, if any, should in no event exceed \$1,500. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for \$1,500 and defendant appeals.

The record discloses that defendant, Colonial Village, Inc., had a contract with A Century of Progress and City of Chicago, which defendant entered into a contract with Fox, whereby Fox was to operate three restaurants located in the Colonial Village of the Fair Grounds. May 16, Fox and the contract to plaintiff, Colonial Village Restaurants, Inc. After the Fair opened, which was the latter part of May, 1934, plaintiff operated the three restaurants located in the Colonial Village until July 15, 1934, when defendant took possession and thereafter operated them until the close of the Fair, October 31, 1934.

Under the written contract, defendant Village collected the gross receipts from the operation of the restaurants and after deducting 15%, the balance was to be turned over to plaintiff. Seven cash registers were installed and used by Fox until July 7. About June 23, the cash register concern which installed the 7 cash registers charged defendant, Colonial Village with \$872 rental, being the first installment. Afterward defendant deducted this amount from the receipts and sent the balance to Fox. He objected to the charge and there was considerable correspondence as to which party was liable for this item.

Defendant, Colonial Village, Inc., entered into a contract with A Century of Progress which provided: "A Century of Progress may require any Concessionaire at the Concessionaire's expense to install or use coin devices, cash registers, turnstiles, ticket choppers, duplicate tag devices, tickets or tags, or any other equipment or devices necessary or proper in the opinion of A Century of Progress, for recording attendance, service or sales in connection with the Concession." And the contract of defendant, Colonial Village, Inc., with Fox provided that Fox and his representatives would comply with the rules and requirements of A Century of Progress. The contract stated that Fox knew the contents of the contract entered into between defendant, Colonial Village, Inc. and A Century of Progress; that the terms and agreement of contract between A Century of Progress and defendant were binding on Fox and that Fox would "keep accurate records of all receipts *** by *** cash registers, *** as shall be directed by" defendant Village, and the Village "will install his own cashiers and collectors at the expense of" Fox. There is no express provision in the contract as to who should pay for the cash registers.

Defendant contends Fox was present when the cash registers were ordered and agreed to their installation and that he would

Under the written contract, defendant William Delaney
 the proceeds from the operation of the business and
 after October 15, the balance was to be turned over to Delaney
 till. Seven cash registers were installed and used in the hotel
 July 7. About June 22, the cash register concern which installed
 the 7 cash registers changed defendant, Colonial Village, with
 1878 rental, being the first installment. Afterward defendant
 deducted this amount from the receipts and sent the balance to
 Fox. He objected to the charge and there was considerable re-
 spondence as to which party was liable for the loss.
 Defendant, Colonial Village, Inc., entered into a contract
 with a Century of Progress which provided: "A Century of Progress
 may require any concessionaire at the concessionaire's expense
 to install or use coin devices, cash registers, receipts, tickets
 receipts, tickets and devices, tickets or fees, or any other
 equivalent or device necessary or proper in the opinion of a
 Century of Progress, for recording, recording, receipt or other
 in connection with the concession." And the contract of defendant,
 Colonial Village, Inc., with Fox provided that Fox and his repre-
 sentatives would comply with the rules and regulations of a
 Century of Progress. The contract stated that Fox knew the con-
 tents of the contract entered into between defendant, Colonial
 Village, Inc., and a Century of Progress; that the terms and con-
 tents of contract between a Century of Progress and defendant
 were binding on Fox and that the word "cash register" was dis-
 by "Colonial Village, Inc. and the Village will install its own
 cashiers and collectors at the expense of Fox. There is no
 express provision in the contract as to who should pay the cost
 cash register.
 Defendant Fox and Fox are present with the cash register
 were ordered and agreed to their installation and that the

pay for them. This contention is disputed. Upon a consideration of the evidence and stipulation in the record, we are unable to say the finding of the trial judge, in favor of plaintiff, is against the manifest weight of the evidence.

Six other items were deducted by defendant from the gross receipts of the restaurants and the dispute between the parties is as to which party was liable for these items, plaintiff taking the position defendant had no right to make these deductions, while on the other side, defendant contends the deductions from the gross receipts were properly made. The items are: July 14, 1934, \$34.15, wall papering done by defendant; July 21, \$255, dramshop insurance paid by defendant; July 25, \$78.57, wages paid to a chef by the name of Mischel, a discharged employee of defendant; July 25, \$111.50, paid by defendant for curtains installed in the restaurants; July 25, \$14.30, installation of light and base plugs; and July 25, \$351.01, paid by defendant to the B-W Construction Company for various alterations and installations. It was stipulated that all these items were paid by defendant and the only controversy is whether they should be borne by plaintiff or defendant.

The items of \$34.15, \$111.50 and \$14.30 were paid by defendant for work which defendant contends was required to be done in the restaurants by A Century of Progress and that these items should be borne by plaintiff who was operating the restaurants at the time. There is evidence to the effect that a representative of defendant approved some of the work before it was charged and there is other evidence that Fox never authorized the installation of the base plugs and that he did not agree to pay for these items. We are unable to say that the trial judge was wrong in allowing these items, which he apparently did, although there is nothing in the record which shows whether the court allowed all of them as he gave no reason for his finding for plaintiff.

pay for them. This contention is disputed. When a consideration of the evidence and stipulation in the record, we are unable to say the finding of the trial judge, in favor of plaintiff, is against the manifest weight of the evidence.

Six other items were deducted by defendant from the receipts of the restaurant and the dispute between the parties is as to which party was liable for these items, plaintiff taking the position defendant had no right to make these deductions, while on the other side, defendant contends the deductions from the gross receipts were properly made. The items are: July 1, 1934, \$34.15, wall papering done by defendant; July 1, 1934, \$18.00, telephone insurance paid by defendant; July 1, 1934, \$18.00, wages paid to a chef by the name of Ischell, a discharged employee of defendant; July 15, \$11.50, paid by defendant for curtains installed in the restaurant; July 15, \$14.50, installation of light and base plugs; and July 15, \$31.01, paid by defendant to the Construction Company for various alterations and installations. It was stipulated that all these items were paid by defendant and the only controversy is whether they should be borne by plaintiff or defendant.

The items of \$34.15, \$11.50 and \$14.50 were paid by defendant for work which defendant contends was required to be done in the restaurant by a company of progress and that these items should be borne by plaintiff who was operating the restaurant at the time. There is evidence to the effect that a representative of defendant approved some of the work before it was completed and there is other evidence that for many months the installation of the base plugs and that he did not agree to pay for these items. We are unable to say that the trial judge was wrong in allowing these items, which he apparently did, although there is nothing in the record which shows whether the court allowed all of them or not as reason for his finding for plaintiff.

As to the item of \$255. This was the premium on dramshop liability insurance which was required, and apparently was the amount of premium for the duration of the Fair - five months. The evidence tends to show that defendant, Colonial Village, sent a bill August 31, to plaintiff for \$53.55, which apparently was the earned premium from the time the Fair opened until the restaurants were taken over by the Colonial Village in July, 1934. We think plaintiff was liable for \$53.55 of the item and was not entitled to recover the total amount, \$255.

As to the item of \$78.57, being the wages paid by defendant to the chef, Mischel. The evidence as to this leaves the question somewhat uncertain but we gather that Mischel was employed by The Adam George Corporation and was given a check for \$78.57 which, the evidence tends to show, the bank, on which it was drawn, refused to pay. It is not clear who made the check but apparently it was The Adams George Corporation. After the check was dishonored and after the Colonial Village took over the restaurants in July, there is evidence to the effect that the Village discharged Mischel and the union to which he belonged threatened to cause trouble unless the bad check was made good and thereupon defendant paid this amount. We are unable to see how, under the evidence, plaintiff should be charged with this item.

As to the \$351.01. This item was paid by defendant to a construction company for various alterations and installations in the restaurants. Counsel for defendant say that the rules of A Century of Progress required its final approval as to furniture, decorations, fixtures, awnings, etc. There is a dispute as to whether the Village representative supervised the decorations in the restaurants. He testified he only saw the plans of the proposed kitchen equipment. Another of defendant's representatives testified he found the restaurants were improperly decorated and

As to the item of \$33.50. This was the premium on fire insurance liability insurance which was required, and apparently was the amount of premium for the duration of the trial - five months. The evidence tends to show that defendant, Colonial Village, sent a bill August 31, to plaintiff for \$33.50, which apparently was the earned premium from the time the trial opened until the restaurants were taken over by the Colonial Village in July, 1934. We think plaintiff was liable for \$33.50 of the item and was not entitled to recover the total amount, \$35.

As to the item of \$8.00, being the wages paid by defendant to the chef, Michael. The evidence as to this leaves the question somewhat uncertain but we gather that Michael was employed by The Adam George Corporation and was given a check for \$8.00 which, the evidence tends to show, the bank, on which it was drawn, refused to pay. It is not clear who made the check but apparently it was The Adam George Corporation. After the check was dishonored and after the Colonial Village took over the restaurants in July, there is evidence to the effect that the Village discharged Michael and the union to which he belonged threatened to cause trouble unless the bad check was cashed and thereupon defendant paid this amount. We are unable to say how, under the evidence, plaintiff should be charged with this item.

As to the \$351.01. This item was paid by defendant to a construction company for various alterations and installations in the restaurants. Counsel for defendant says that the rules of A Century of Progress required its firm approval as to furniture, decorations, fixtures, window, etc. There is a dispute as to whether the Village representative authorized the decorations in the restaurants. He testified he only saw the plans of the proposed kitchen equipment. Another of defendant's representatives testified he found the restaurants were improperly decorated and

Fox was advised of this fact but refused to make the corrections. Thereupon defendant had the work done. Fox disclaimed any knowledge of certain of the installations. Defendant stipulated it had received \$200.75 on account of this item from the Virginia Tavern, leaving a balance of \$150.26 remaining unpaid. Just why the payment was made by the Virginia Tavern, and the entire bill not paid by it, the record does not disclose. But in any view of the evidence, we think we would not be justified in holding that plaintiff was liable for this item or any part of it.

Although plaintiff was chargeable with \$53.55 on account of the dramshop insurance, charging plaintiff with this sum would not affect the amount of the judgment because the maximum amount of recovery was limited by stipulation, to \$1500 although the evidence showed more than this sum was due.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

Fox was advised of this fact but refused to make the necessary
 Thompson statement and the fact does, for all practical purposes, leave
 of course of the installation, but cannot establish it
 had received \$100.75 on account of this loan from the Virginia
 Tavern, leaving a balance of \$15.00 remaining unpaid. Just
 why the payment was made by the Virginia Tavern, and the entire
 bill not paid by it, the record does not disclose. But in any
 view of the evidence, we think we would not be justified in hold-
 ing that plaintiff was liable for this item or any part of it.
 Although plaintiff was concerned with \$22.50 on account
 of the dramshop insurance, charging plaintiff with this would
 not affect the amount of the judgment because the balance amount
 of recovery was limited by stipulation, to \$150 although the
 evidence showed more than this was due.

The judgment of the Circuit Court of Cook County is affirmed.

THOMAS J. WILSON, J.

McNulty, P. J., and Macomber, J., concur.

42072

315 I.A. 237²

R. E. SNOBERGER,
Appellant,

v.

BINKLEY COAL COMPANY, a corporation,
HELEN C. HANSON, HUBERT E. HOWARD,
and PYRAMID COAL CORPORATION, a
corporation,
Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 30, 1940, plaintiff filed his complaint in equity alleging he was a stockholder of defendant, Binkley Coal Company, a corporation. He sought to establish that 5,000 shares of the common stock of defendant, Pyramid Coal Company, a corporation (2,000 of which were held and claimed to be owned by Helen C. Hanson and the remaining 3,000 shares by defendant, Hubert E. Howard) belonged to and were the property of the Binkley Coal Company. The complaint and an amended complaint filed May 29, 1940, were stricken on motion of defendant, Hanson, and afterward, May 7, 1941, plaintiff filed his second amended complaint to which defendant Hanson's motion to strike was sustained. Plaintiff elected to stand on this complaint, the cause was dismissed as to defendant Hanson, and plaintiff appeals.

The question for decision on this appeal is, did the final complaint state a cause of action? Plaintiff alleges he is the owner of 105 shares of the capital stock of the Binkley Coal Company; that he became the owner of 16 shares December 31, 1935, 14 shares December 31, 1936, 70 shares February 1, 1937, 5 shares March 1, 1939 and that he brings his complaint on behalf of himself and all other stockholders of the Binkley Coal Company, excepting the stockholders named defendants; that the Binkley Coal Company was incorporated September 26, 1921, under the laws of Illinois with a capital stock of 5,000 shares of the par value of \$100 a share; that it was organized for the purpose of locating,

R. W. BROOKS, JR.
Appellant

v.

BINKLEY COAL COMPANY, a corporation,
Helen C. Hanson, Robert H. Hanson,
and PYRAMID COAL CORPORATION, a
corporation,
Appellees.

CHIEF JUSTICE
COURT REPORTER

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 20, 1940, plaintiff filed his complaint in which
alleging he was a stockholder of defendant, Binkley Coal Company,
a corporation. He sought to establish that 5,000 shares of the
common stock of defendant, Pyramid Coal Company, a corporation
(2,000 of which were held and claimed to be owned by Helen C.
Hanson and the remaining 3,000 shares by defendant, Robert H.
Howard) belonged to and were the property of the Binkley Coal
Company. The complaint and an amended complaint filed May 11,
1940, were stricken on motion of defendant, Hanson, and thereafter,
May 7, 1941, plaintiff filed his second amended complaint to which
defendant Hanson's motion to strike was sustained. Plaintiff
elected to stand on this complaint, the same was dismissed as to
defendant Hanson, and plaintiff appeals.

The question for decision on this appeal is, did the
final complaint state a cause of action? Plaintiff alleges he
is the owner of 105 shares of the capital stock of the Binkley
Coal Company; that he became the owner of 18 shares December 11,
1935, 14 shares December 31, 1936, 70 shares February 1, 1937,
5 shares March 1, 1939 and that he brings his complaint on behalf
of himself and all other stockholders of the Binkley Coal Company,
excepting the stockholders named defendants; that the Binkley
Coal Company was incorporated September 26, 1911, under the laws
of Illinois with a capital stock of 5,000 shares of the par value
of 100 a share; that it was organized for the purpose of locating

developing and improving coal and other properties; to buy, sell and deal in coal generally as principal and agent for others "and for the further purpose of assisting and participating in the liquidation, reorganization or refinancing of any industrial or mining company," and since the time of its incorporation was engaged in such business; that defendant Howard, was, and for a long time past, had been president, a director and the owner of a large number of shares; that prior to May 1, 1928, Leroy G. Binkley was president, a director and stockholder of the company and that he and Howard each received large salaries and expenses and were required to devote their entire time to the coal company which distributed coal and acted as selling agent for other coal companies; that they made an agreement on behalf of the Binkley Coal Company with defendant Pyramid Coal Corporation (then engaged in operating a strip coal mine in Perry County, Illinois) to act as agent of the Pyramid Company in the sale of its coal; that the plant and machinery of the Pyramid Company were inadequate and insufficient in the year 1927, but the company had substantial acreages of land in Illinois which contained large quantities of coal; that it became the duty of Binkley and Howard, as officers and directors of the Binkley Coal Company, upon learning of the condition of the Pyramid Coal Corporation, to assist that company in refinancing so that the Binkley Company could continue to sell coal of the Pyramid Company but in violation of their duties to the Binkley Company and to its stockholders, Binkley and Howard conceived and perfected a plan under which they negotiated a sale of 4,000,000 tons of coal, produced by the Pyramid Company, to the Missouri Pacific Railroad; that in carrying out the plan, Binkley and Howard caused a new corporation to be organized, to be known as the Binkley Corporation, with a nominal capital of \$1,000, represented by 200 shares, of which Binkley subscribed for 100 shares, Howard, 99 shares and George J. Leahy, 1 share; that each of

developing and improving coal and other properties; to buy, sell and deal in coal generally as principal and agent for others "and for the further purpose of assisting and participating in the liquidation, reorganization or refinancing of any industrial or mining company," and since the time of its incorporation was engaged in such business; that defendant Howard, was, and for a long time past, had been president, a director and the owner of a large number of shares; that prior to May 1, 1928, Leroy A. Linkley was president, a director and stockholder of the company and that he and Howard each received large salaries and expenses and were required to devote their entire time to the coal company which distributed coal and acted as selling agent for other coal companies; that they made an agreement on behalf of the Linkley Coal Company with defendant Pyramid Coal Corporation (then engaged in operating a strip coal mine in Perry County, Illinois) to act as agent of the Pyramid Company in the sale of the coal; that the plant and machinery of the Pyramid Company were inadequate and insufficient in the year 1927, but the company had substantial acreages of land in Illinois which contained large quantities of coal; that it became the duty of Linkley and Howard, as officers and directors of the Linkley Coal Company, upon learning of the condition of the Pyramid Coal Corporation, to assist that company in refinancing so that the Linkley Company could continue to sell coal of the Pyramid Company but in violation of their entire duty to the Linkley Company and to its stockholders, Linkley and Howard conceived and perfected a plan under which they negotiated a sale of 4,000,000 tons of coal, produced by the Pyramid Company, to the Missouri Pacific Railroad; that in carrying out the plan, Linkley and Howard caused a new corporation to be organized, to be known as the Linkley Corporation, with a nominal capital of \$1,000,000, represented by 200 shares, of which Linkley subscribed for 100 shares, Howard, 99 shares and George J. Leahy, 1 share; that each of

these persons at the time, was an officer and director of the Binkley Coal Company; that plaintiff was not advised whether either of the 3 paid for the stock "but believe" that if the \$1,000 was in fact paid, it was with the money of the Binkley Coal Company and that the shares of capital stock of the Binkley Company, consisting of 200 shares, were issued as follows: Binkley, 9 shares, Howard, 20 shares, Leahy, 1 share, Campbell, 20 shares, Hamilton, 20 shares and Binkley Coal Company, 130 shares; that upon the organization of the Binkley Corporation, it, as sales'agent, through Binkley and Howard, entered into a contract to sell 4,000,000 tons of coal of the Pyramid Company to the Missouri Pacific Railroad Company, which was in violation of their duties to the Binkley Coal Company; that as a part of the plan, the Binkley Corporation was consolidated about May 4, 1928 with the Pyramid Coal Company. [While it is not clear from the allegations of the complaint yet we think it appears that at that time a new Pyramid Coal Company was organized having a capital stock of 7500 shares of preferred and 20,000 shares of common stock; that 6,000 shares of the preferred were issued to the stockholders of the old Pyramid Company and that all of the shares of common stock were then issued to the Binkley Corporation on the basis of 100 shares of the new Pyramid Company stock for 1 share of the Binkley Corporation, so that the shares of the new Pyramid Company were issued as follows: Binkley, 900 shares, Leahy, 100 shares, Howard, 2,000 shares, Hamilton, 2,000 shares, Campbell, 2,000 shares and Binkley Coal Company, 13,000 shares.] That as a part of the plan "Howard effected the loan to the consolidated Pyramid Coal Corporation of \$1,250,000, secured by the first mortgage bonds" of the Pyramid Company dated May 1, 1928, the proceeds of which were apparently used to pay stockholders of the Pyramid Company the balance of the purchase price over and above \$600,000 for the 6,000 shares of preferred stock, the

these persons at the time, was an officer and director of the Binkley Coal Company; that plaintiff was not advised whether either of the 3 paid for the stock "but believe" that if the 1,000 was in fact paid, it was with the money of the Binkley Coal Company and that the shares of capital stock of the Binkley Company, consisting of 200 shares, were issued as follows: Binkley, 2 shares, Howard, 20 shares, Leahy, 1 share, Campbell, 20 shares, Hamilton, 20 shares and Binkley Coal Company, 120 shares; that upon the organization of the Binkley Corporation, it, as sales agent, through Binkley and Howard, entered into a contract to sell 4,000,000 tons of coal of the Pyramid Company to the Missouri Pacific Railroad Company, which was in violation of their duties to the Binkley Coal Company; that as a part of the plan, the Binkley Corporation was consolidated about May 1, 1923 with the Pyramid Coal Company. [While it is not clear from the allegations of the complaint yet we think it appears that at that time a new Pyramid Coal Company was organized having a capital stock of 7500 shares of preferred and 20,000 shares of common stock; that 6,000 shares of the preferred were issued to the stockholders of the old Pyramid Company and that all of the shares of common stock were then issued to the Binkley Corporation on the basis of 100 shares of the new Pyramid Company stock for 1 share of the Binkley Corporation, so that the shares of the new Pyramid Company were issued as follows: Binkley, 200 shares, Leahy, 100 shares, Howard, 1,000 shares, Hamilton, 1,000 shares, Campbell, 2,000 shares and Binkley Coal Company, 12,000 shares.] That as a part of the plan "Howard effected the loan to the consolidated Pyramid Coal Corporation of \$1,250,000, secured by the first mortgage bonds" of the Pyramid Company dated May 1, 1923, the proceeds of which were apparently used to pay stockholders of the Pyramid Company the balance of the purchase price over and above \$200,000 for the 6,000 shares of preferred stock, the

balance of the loan being used to acquire coal properties then held under option to the old Pyramid Company, and to purchase equipment. That such monies were insufficient and the \$150,000 of the Binkley Coal Company was used to pay for the balance of the equipment, for which the Binkley Coal Company took 1,500 shares of the preferred stock of the new Pyramid Company; that as a part of the plan the Binkley Coal Company was to act as exclusive sales' agent for the Pyramid Company, but to obtain the funds above mentioned, it was also provided the Missouri Pacific Railroad Company should pay part of the purchase price of the 4,000,000 tons of coal to the trustee of the bond issue to be applied toward the payment of the bonds.

It is further alleged the Binkley Coal Company should not collect any commissions for its services in connection with the sale of the coal to the Railroad Company until after the bond issue was paid and the bonds retired. And continuing, it is alleged "as was well known to all the parties, the Binkley Coal Company, as such exclusive sales agent, would be called upon to perform services of a substantial and valuable nature in servicing the said contract with the Missouri Pacific Railroad," and that thereafter Binkley and Howard devoted practically all their time and efforts to carrying out the plans.

That in equity the contract between the Binkley Company and the Railroad Company belonged to and was an asset of the Binkley Coal Company and that "all of the stock issued to the Binkley Coal Company, Leroy G. Binkley, Hubert E. Howard and George J. Leahy, who were then officers and directors of the Binkley Coal Company, for the services of the said Binkley Coal Company"; the services in connection with the bond issue; the merging of the two corporations; and the financing of \$150,000 belonged to the Binkley Coal Company and were held by these individuals as trustees for the Binkley Coal Company.

balance of the loan being used to acquire coal properties then held under option to the old Pyramid Company, and to purchase equipment. That such monies were insufficient and the \$100,000 of the Binkley Coal Company was used to pay for the balance of the equipment, for which the Binkley Coal Company took \$1,000 shares of the preferred stock of the new Pyramid Company; that as a part of the plan the Binkley Coal Company was to act as exclusive sales agent for the Pyramid Company, but to obtain the funds above mentioned, it was also provided the Missouri Pacific Railroad Company should pay part of the purchase price of the \$1,000,000 tons of coal to the trustee of the bond issue to be applied toward the payment of the bonds.

It is further alleged the Binkley Coal Company should not collect any commissions for its services in connection with the sale of the coal to the Railroad Company until after the bond issue was paid and the bonds retired. And continuing, it is alleged "as was well known to all the parties, the Binkley Coal Company, as such exclusive sales agent, would be called upon to perform services of a substantial and valuable nature in carrying the said contract with the Missouri Pacific Railroad," and that thereafter Binkley and Howard devoted practically all their time and efforts to carrying out the plan.

That in equity the contract between the Binkley Company and the Railroad Company belonged to and was an asset of the Binkley Coal Company and that "all of the stock issued to the Binkley Coal Company, Percy G. Binkley, Albert J. Howard and George J. Leahy, who were then officers and directors of the Binkley Coal Company, for the services of the said Binkley Coal Company; the services in connection with the bond issue; the making of the two corporations; and the financing of \$100,000 belonged to the Binkley Coal Company and were held by these individuals as trustees for the Binkley Coal Company.

That after the consolidation, Leahy transferred his 100 shares of stock in the new Pyramid Company to Binkley; that Binkley died intestate November 16, 1930, leaving as his only heirs at law his widow, Helen C. Binkley (who subsequently married Ralph R. Hanson) and three minor children. That November 27, 1930, the Foreman Trust and Savings Bank was appointed administrator of his estate by the Probate court of Cook county. That the administrator filed an inventory showing 2,000 shares of the common stock of the new Pyramid Coal Company which were said to be held in escrow by the Southern Illinois Trust Company "until 250 shares of preferred stock is paid up." That Binkley, during his lifetime was never the record holder of the 2,000 shares but only 1,000 of such shares and that afterward the administrator was holder of record of 1,000 shares of such common stock. That March 30, 1931, the directors of the Binkley Coal Company adopted a purported resolution directing the surrender of the certificates of the common stock of the Pyramid Coal Company representing 13,000, to the Southern Illinois Trust Company, of East St. Louis, the Registrar and Transfer Agent for the Pyramid stock, and to receive in lieu thereof a certificate for 10,300 shares of the common stock of the Pyramid Company. The remaining 2,700 shares of the Pyramid Coal Company common stock were then issued as follows: 1,000 shares to the Foreman Trust and Savings Bank, as administrator, 1,000 shares to Howard, 700 shares to Howard as trustee, and that the resolution was carried out. That the transfer of the 1,000 shares of stock to the administrator and the 1,000 shares to Howard was without any consideration to the Binkley Coal Company.

It is further alleged that about February 26, 1931, an order was entered by the Probate court of Cook county in the Binkley estate fixing the widow's award at \$25,000 and afterward,

That after the consolidation, being transferred the 100 shares of stock in the new Pyramid Company to Hinkley; that Hinkley died intestate November 16, 1930, leaving as his only wife at law his widow, Helen G. Hinkley (who subsequently married Ralph R. Hanson) and three minor children. That November 27, 1930, the Foreman Trust and Savings Bank was appointed administrator of his estate by the Probate court of Cook county. That the administrator filed an inventory showing 1,000 shares of the common stock of the new Pyramid Coal Company which were said to be held in escrow by the Southern Illinois Trust Company "until 250 shares of preferred stock is paid up." That Hinkley, during his lifetime was never the record holder of the 1,000 shares but only 1,000 of such shares and that after the administrator was holder of record of 1,000 shares of such common stock. That March 30, 1931, the directors of the Hinkley Coal Company adopted a purported resolution directing the surrender of the certificates of the common stock of the Pyramid Coal Company representing 12,000, to the Southern Illinois Trust Company, of East St. Louis, and to the Registrar and Transfer Agent for the Pyramid stock, and to receive in lieu thereof a certificate for 10,700 shares of the common stock of the Pyramid company. The remaining 1,300 shares of the Pyramid Coal Company common stock were then issued as follows: 1,000 shares to the Foreman Trust and Savings Bank, as administrator, 1,000 shares to Howard, 700 shares to Howard as trustee, and that the resolution was carried out. That the transfer of the 1,000 shares of stock to the administrator and the 1,000 shares to Howard was without any consideration to the Hinkley estate filing the will's award at \$25,000 and afterward, Hinkley Coal Company.

It is further alleged that about February 22, 1931, an order was entered by the Probate court of Cook county in the Hinkley estate filing the will's award at \$25,000 and afterward,

May 8, 1934, another order was entered by the Probate court which recited there were unpaid claims and expenses against the estate amounting to \$8,000 and the administrator was directed to sell and transfer the 2,000 shares of common stock of the Pyramid Company to Binkley's widow, the present defendant, Helen C. Hanson, for \$8,000. Apparently this was done by the administrator receiving a credit of \$8,000 on the widow's award. That "no necessity for the sale of said stock *** would have existed had the widow's award to Helen C. Hanson been proportionate with the size of the estate *** and that said award was made excessively high in order that said sales of the stock *** might be required *** that *** Helen C. Hanson then well knew or should have known the manner in which said common stock of the Pyramid Coal Corporation was acquired and well knew that the stock of the Pyramid Coal Corporation in equity belonged to the Binkley Coal Company." That from November 27, 1930, the date the administrator was appointed, until July 9, 1934, Mrs. Hanson was actively interested in the affairs of the Binkley Coal Company and had a representative of herself or of the administrator on the Board of Directors of that company "and by and through such representative and her agents and employees was advised as to the affairs of the Binkley Coal Company and the Pyramid Coal Corporation," receiving numerous oral and written reports; that prior to May 8, 1934, Mrs. Hanson consulted the directors of the Binkley Coal Company and the Pyramid Coal Corporation relative to the purchase by her of the stock from the administrator "and was advised by said officers *** as to the manner in which said stock was acquired" by Binkley and his administrator and that she then knew or should have known that the 2,000 shares of the common stock of the Pyramid Company did not belong to Binkley in his lifetime or to his administrator thereafter.

It is further alleged that the facts and circumstances

May 8, 1934, another order was entered by the probate court which recited there were unpaid claims and expenses against the estate amounting to \$8,000 and the administrator was directed to sell and transfer the 2,000 shares of common stock of the Pyramid Company to Binkley's widow, the present defendant, Helen C. Hanson, for \$8,000. Apparently this was done by the administrator receiving a credit of \$8,000 on the widow's award. That "no necessity for the sale of said stock" would have existed had the widow's award to Helen C. Hanson been proportionate with the size of the estate and that said award was made excessively high in order that said sales of the stock might be retained *** that Helen C. Hanson then well knew or should have known the manner in which said common stock of the Pyramid Coal Corporation was acquired and well knew that the stock of the Pyramid Coal Corporation in equity belonged to the Binkley Coal Company. That from November 17, 1930, the date the administrator was appointed, until July 9, 1934, Mrs. Hanson was actively interested in the affairs of the Binkley Coal Company and had a representative of herself or of the administrator on the board of directors of that company and by and through such representative and her agents and employees as advised as to the affairs of the Binkley Coal Company and the Pyramid Coal Corporation, "receiving numerous oral and written reports; that prior to May 8, 1934, Mrs. Hanson consulted the directors of the Binkley Coal Company and the Pyramid Coal Corporation relative to the purchase by her of the stock from the administrator" and was advised by said officers *** as to the manner in which said stock was acquired" by Binkley and his administrator and that she then knew or should have known that the 2,000 shares of the common stock of the Pyramid Company did not belong to Binkley in his lifetime or to his administrator thereafter.

It is further alleged that the facts and circumstances

surrounding the issuance of the 2,000 shares of stock to Binkley and his administrator were not known to plaintiff at the time he became a stockholder but that he was then advised by Howard and the coal company that "all actions of the Binkley Coal Company from the date of its incorporation were legal and proper;" that he relied upon such statements and thereafter, from the date of his first purchase of stock the facts were fraudulently concealed from him. That Mrs. Hanson knowing all the facts conspired with Howard to retain the stock "intending to conceal her said knowledge as aforesaid purported to purchase said stock from the Administrator *** with funds, which said Administrator would repay to her in whole or in part, as and for her widow's award."

It is further alleged plaintiff had complete confidence in Howard and Binkley and that while plaintiff has been a stockholder since 1935 "and an officer and director of the Binkley Coal Company during a portion of the time from that date to the present date, he has been during all of that time, actively engaged in the sale and production of coal in the State of Indiana, that in the stockholders', directors' and officers' meetings he attended, only current matters were discussed, and no books or records were presented as to acts or doings of the corporation for the years 1928 to and including 1935;" that he knew nothing of the details until about July 1, 1939; that he has demanded of Mrs. Hanson and Howard the return of the 5,000 shares of common stock to the Pyramid Company; that he has not applied to the Board of Directors of the Binkley Coal Company or to its stockholders for relief because the Board of Directors and the stockholders could not compel the redelivery of the stock to the Pyramid Company, and that plaintiff had not demanded of the Board of Directors of the Binkley Coal Company that suit be instituted against Mrs. Hanson and Howard for the return of the stock, for the reason that the Board of Directors was dominated by Howard

surrounding the issuance of the 5,000 shares of stock to Binkley
 and his administrator were not known to plaintiff at the time
 he became a stockholder but that he was then advised by Howard
 and the coal company that "all matters of the Binkley Coal Company
 from the date of its incorporation were legal and proper;" that
 he relied upon such statements and thereafter, from the date of
 his first purchase of stock the facts were fraudulently concealed
 from him. That Mrs. Hanson knowing all the facts conspired with
 Howard to retain the stock "intending to conceal her said know-
 ledge as aforesaid purported to purchase said stock from the
 Administrator *** with funds, which said administrator would
 repay to her in whole or in part, as and for her own use and
 it is further alleged plaintiff had complete confidence
 in Howard and Binkley and that while plaintiff has been a stock-
 holder since 1938 "and an officer and director of the Binkley
 Coal Company during a portion of the time from that date to the
 present date, he has been during all of that time, actively en-
 gaged in the sale and production of coal in the State of Indiana,
 that in the stockholders', directors', and officers' meetings he
 attended, only current matters were discussed, and no books or
 records were presented as to acts or omissions of the corporation
 for the years 1938 to and including 1939; that he knew nothing
 of the details until about July 1, 1939; that he has demanded
 of Mrs. Hanson and Howard the return of the 5,000 shares of common
 stock to the Pyramid Company; that he has not applied to the
 Board of Directors of the Binkley Coal Company or to its stock-
 holders for relief because the Board of Directors and the stock-
 holders could not compel the delivery of the stock to the Py-
 ramid Company, and that plaintiff had not demanded of the Board of
 Directors of the Binkley Coal Company that suit be instituted
 against Mrs. Hanson and Howard for the return of the stock, for
 the reason that the Board of Directors was dominated by Howard

and therefore the Board would refuse to take action; that he had not demanded of the shareholders of the Binkley Coal Company that they institute suit for the reason that Howard was the largest stockholder and "completely dominates and controls all stockholders' meetings;" that by reason of the issuance of the matters alleged, the Binkley Coal Company had been deprived of substantial assets.

There are many other allegations in the complaint which we have not mentioned. The prayer is that the 5,000 shares of common stock of the Pyramid Coal Company be held to belong to the Binkley Coal Company and that Mrs. Hanson be required to return the 2,000 shares to the Binkley Coal Company. Howard and the corporate defendants are not parties to this appeal.

Counsel for Helen C. Hanson, who is the only defendant before this court, say that the complaint does not allege sufficient facts to show that the 2,000 shares of common stock of the Pyramid Coal Company, involved in this appeal are held in trust by Mrs. Hanson; that the allegations are these shares were issued in 1928 "as a part of a consolidation" of the Pyramid Coal Corporation and the Binkley Corporation, etc. and that the facts alleged in connection with the carrying out of the plan are nebulous and uncertain. We think this contention must be sustained. Moreover we are of opinion it does not appear from the allegations of the complaint that Binkley or Howard (in what they did toward the organization of the Binkley corporation in agreeing that the Binkley Coal Company was to act as exclusive sales' agent for the Pyramid Coal Company and not to collect commissions on certain sales) acted in bad faith or contrary to the interests of the Binkley Coal Company. From the allegations of the complaint, which we have above set forth, it appears that the Pyramid Coal Company needed money and equipment so it could continue in the business and thereby enable the Binkley Coal Company to act as its exclusive

and therefore the only way to take action; that he had not demanded of the shareholders of the Binkley Coal Company that they institute suit for the reason that Howard was the largest stockholder and "completely dominates and controls all stockholders' meetings"; that by reason of the issuance of the stock alleged, the Binkley Coal Company had been deprived of substantial assets.

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Counsel for Helen G. Hanson, who is the only defendant before this court, say that the complaint does not allege sufficient facts to show that the 5,000 shares of common stock of the Pyramid Coal Company, involved in this appeal are held in trust by Mrs. Hanson; that the allegations and these shares were issued in 1928 "as a part of a consolidation" of the Pyramid Coal Corporation and the Binkley Corporation, etc., and that the facts alleged in connection with the carrying out of the plan are nebulous and uncertain. We think this contention must be sustained. Moreover we are of opinion it does not appear from the allegations of the complaint that Binkley or Howard (in what they did toward the organization of the Binkley Corporation in creating that the Binkley Coal Company was to act as exclusive sales agent for the Pyramid Coal Company and not to collect commissions on certain sales) acted in bad faith or contrary to the interests of the Binkley Coal Company. From the allegations of the complaint, which we have above set forth, it appears that the Pyramid Coal Company needed money and equipment so it could continue in the business and thereby enable the Binkley Coal Company to act as the exclusive

sales' agent. The Binkley Company was then formed to bring about this result. The Missouri Pacific Railroad Company, to whom the 4,000,000 tons of coal was sold was required to pay part of the purchase price to the trustee of the bond issue which was to apply in payment of some of the bonds.

The complaint then continues, and it was further provided that the Binkley Coal Company should not collect any commission for its services in connection with the sale and delivery of said coal to the Missouri Pacific Railroad Company until after said bond issue should be paid and retired, although it is further alleged that the Binkley Coal Company would be called upon to perform substantial services "in servicing the said contract with the Missouri Pacific Railroad." But this is far short of saying the Binkley Coal Company was never to be paid for such services, but only that it should not be paid for such services until certain of the bonds were paid. For aught that appears from the allegations, what was done in this respect was necessary to consummate the plan so that the Pyramid Coal Company could continue in business and the Binkley Coal Company could continue to earn commissions on sales.

We might also say that the allegations of the complaint (to the effect that the Pyramid Coal Company was in need of funds to continue in business and that it was "the duty of the said LeRoy G. Binkley and Hubert E. Howard as officers and directors of the Binkley Coal Company, to assist the Pyramid Coal Corporation in such refinancing" so that the Binkley Coal Company could continue to earn commissions) are unsound. So far as the facts allege the Binkley Coal Company was under no duty or obligation to refinance the Pyramid Company at all, unless it saw fit to do so as a good business proposition.

Further deficiencies of the allegations might be pointed

sales' agent. The Binkley Company was then formed to bring about this result. The Missouri Pacific Railroad Company, to whom the 4,000,000 tons of coal was sold was required to pay part of the purchase price to the trustee of the bond issue which was to apply in payment of some of the bonds.

The complaint then continued, and it was further provided that the Binkley Coal Company should not collect any commission for its services in connection with the sale and delivery of said coal to the Missouri Pacific Railroad Company until after said bond issue should be paid and retired, although it is further alleged that the Binkley Coal Company would be called upon to perform substantial services "in servicing the said contract with the Missouri Pacific Railroad." But this is far short of saying the Binkley Coal Company was never to be paid for such services, but only that it should not be paid for such services until certain of the bonds were paid. For aught that appears from the allegations, what was done in this respect was necessary to consummate the plan so that the Pyramid Coal Company could continue in business and the Binkley Coal Company could continue to earn commissions on sales.

We might also say that the allegations of the complaint (to the effect that the Pyramid Coal Company was in need of funds to continue in business and that it was "the duty of the said Percy W. Binkley and Hubert E. Howard as officers and directors of the Binkley Coal Company, to assist the Pyramid Coal Company in such refinancing" so that the Binkley Coal Company could continue to earn commissions) are unavailing. So far as the facts allege the Binkley Coal Company was under no duty or obligation to refinance the Pyramid Company at all, unless it was fit to do so as a good business proposition. Further allegations of the allegations might be pointed

out in this respect but we think nothing further need be said here.

We are further of opinion that the allegations as to the method in which Mrs. Hanson acquired the 2,000 shares of stock are insufficient to state a cause of action. The 2,000 shares were inventoried by the administrator. They were sold in accordance with the order of the Probate court to Mrs. Hanson for \$8,000 and there is no allegation that this was not a fair price. But the allegation is that the allowance of the widow's award was excessively high. This was a matter wholly within the jurisdiction of the Probate court and cannot be questioned, under the allegations made in the complaint. And, although it is alleged that Mrs. Hanson knew, or in the exercise of care should have known "as to the manner in which said stock was acquired" we think the allegation falls short of setting up facts in this respect.

We are further of opinion the lapse of time ought to bar plaintiff's suit. The 2,000 shares were issued in 1928; Binkley died in 1930; the administrator filed its inventory, which was approved by the Probate court, in 1931; the stocks were sold pursuant to the order of the Probate court to Mrs. Hanson for \$8,000 in 1934. Plaintiff purchased his first stocks December 31, 1935 and the last March 1, 1939. During part of this time he was a director of the Binkley Coal Company. Many of these facts were shown of record and while it is alleged that Mrs. Hanson conspired with Howard to conceal the facts, no specific facts in this respect, are set forth and mere silence on the part of Mrs. Hanson is insufficient to excuse plaintiff from failing to bring his suit sooner. Jackson v. Anderson, 355 Ill. 550. In that case the court said: "Mere silence of the defendant and mere failure on the part of the complainant to learn of a cause of action do not amount to such fraudulent concealment. *** Furthermore, we have held that good faith and reasonable diligence are essential

out in this respect but we think nothing further need be said here.
We are further of opinion that the allegations as to the
method in which Mrs. Hanson acquired the 2,000 shares of stock
are insufficient to state a cause of action. The 2,000 shares
were inventoried by the administrator. They were sold in accord-
ance with the order of the Probate court to Mrs. Hanson for \$5,000
and there is no allegation that this was not a fair price. But
the allegation is that the allowance of the widow's share was
excessively high. This was a matter wholly within the juris-
diction of the Probate court and cannot be questioned, under
the allegations made in the complaint. And, although it is al-
leged that Mrs. Hanson knew, or in the exercise of care should
have known "as to the manner in which said stock was acquired"
we think the allegation falls short of setting up facts in this
respect.

We are further of opinion the lapse of time ought to
bar plaintiff's suit. The 2,000 shares were issued in 1922;
Sinkley died in 1923; the administrator filed its inventory, which
was approved by the Probate court, in 1924; the stocks were sold
pursuant to the order of the Probate court to Mrs. Hanson for
\$5,000 in 1924. Plaintiff purchased his first stock December 21,
1925 and the last March 1, 1926. During part of this time he was
a director of the Sinkley Coal Company. Any of these facts were
shown of record and while it is alleged that Mrs. Hanson conspired
with Howard to conceal the facts, no specific facts in this
respect are set forth and mere reliance on the part of Mrs. Hanson
is insufficient to excuse plaintiff from failing to bring his
suit sooner. Jackson v. Anderson, 202 Ill. 521. In that case
the court said: "The silence of the defendant and mere reliance
on the part of the plaintiff to bring on a cause of action
do not amount to such fraudulent concealment." See Anderson,
we have held that good faith and reasonable diligence are essential

elements in asking for relief from a court of equity." Upon a consideration of the allegations of the complaint we are of opinion that plaintiff did not exercise the diligence required.

A further point is made by counsel for defendant that plaintiff cannot maintain the suit because the alleged wrongs complained of occurred before plaintiff became a stockholder of the Binkley Coal Company and Goldberg v. Ball, 305 Ill. App. 273, and another case are cited. The Ball case sustains the contention. But in City of Chicago v. Cameron, 22 Ill. App. 91, there was a contrary opinion. In that case it was held the fact that the complainant became a stockholder after the completion of the acts complained of did not effect his right to commence an action which is maintained for the benefit of all the stockholders. And the same rule of law has been announced by courts from other states. See Pollitz v. Gould, 202 N. Y. 11. But in view of what we have said, we think it unnecessary to pass on this point.

For the reasons stated, the decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

elements in asking for relief from a court of equity." Upon a

consideration of the allegations of the complaint we are of opinion that plaintiff did not exercise the diligence required.

A further point is made by counsel for defendant that

plaintiff cannot maintain the suit because the alleged wrongs complained of occurred before plaintiff became a stockholder of the Binkley Coal Company and Goldberg v. Ball, 303 Ill. App. 278, and another case are cited. The Ball case sustains the contention.

But in City of Chicago v. Cameron, 22 Ill. App. 21, there was a contrary opinion. In that case it was held the fact that the

complainant became a stockholder after the completion of the acts complained of did not effect his right to commence an action which

is maintained for the benefit of all the stockholders. And the same rule of law has been announced by courts from other states.

See Politz v. Gould, 302 N. Y. 11. But in view of what we have said, we think it unnecessary to pass on this point.

For the reasons stated, the decree of the Circuit Court

of Cook County is affirmed.

DEORNE ATTORNEY

Matchett, P. J., and McHenry, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1942.

Term No. 42F20

Agenda No. 8

ROBERT W. EDMISTON, Administrator
of the Estate of RONALD WAYNE
EDMISTON, Deceased,

Plaintiff-Appellant

vs.

ROBERT HAMPTON,

Defendant-Appellee.

Appeal from the

Circuit Court of

Madison County.

STONE, P.J.

315 I.A. 205¹

This suit was commenced by Robert W. Edmiston, Administrator of the Estate of Ronald Wayne Edmiston, deceased, Plaintiff-Appellant, who will be referred to hereinafter as plaintiff, against Robert Hampton, Defendant-Appellee, who will be referred to hereinafter as defendant, to recover damages growing out of the death of plaintiff's 11 year old son, who was struck and killed in Collinsville, Illinois, while crossing a four-lane highway on foot, by an automobile driven by defendant.

The record discloses that the accident happened on the night of July 22, 1940 about 9:30 P. M. on the St. Louis road as it approaches from the East the westerly city limits of the City of Collinsville. St. Louis road is a paved street approximately thirty six to forty feet wide and is a four-lane highway. Plaintiff's intestate, a minor son, aged 11 years past, at the time of the accident, had gone across the street and was returning, walking from the South toward the North across the highway. He had waited for one car to pass going East, then started across to the North. He had reached the last lane, the fourth, on the north side of the highway, when he was struck and killed by the automobile driven by defendant, going West.

The complaint upon which the case was tried consisted of two counts, the first of which alleged in substance that defendant

was guilty of negligently driving his motor vehicle in violation of Sect. 146, Chap. 95 1/2, Ill. Rev. Stats. 1939, in that he operated said motor vehicle at a high and dangerous rate of speed, to-wit 55 miles an hour, and that he also negligently failed to drive his car within a single lane and moved his motor vehicle to the lane in which plaintiff's intestate was walking without first ascertaining that such movement could be made with safety, in violation of Sect. 157 of Chap. 95 1/2, Ill. Rev. Stats. 1939, as a result of which plaintiff's intestate was struck and killed. This count also charged violation of the ordinances of Collinsville, with reference to high and dangerous speed, failure to have said car under control and failure to sound a horn, after observing plaintiff's intestate. The second count, re-alleges several paragraphs of count one and in addition thereto alleges wanton and wilful negligence on the part of defendant.

A default judgment was entered against defendant for want of answer in the sum of \$7500.00, which judgment was afterward set aside by the Court. The first trial by jury was had on March 19, 1941, at which time said jury failed to agree and were discharged by the Court. The second trial by jury was had on May 7, 1941, the jury returning a verdict finding the issues in favor of defendant whereupon judgment was entered against plaintiff in bar of the action, from which judgment he prosecutes his appeal to this Court.

At the close of plaintiff's evidence defendant moved the Court to direct a verdict in favor of defendant generally, as well as direct verdict in favor of defendant on Counts 1 and 2. The Court denied the motion as to both the general motion and as to Count 1 but allowed the motion as to count 2, which contained the allegations of wilful and wanton negligence.

It is assigned generally as error, that the Court erred in refusing to set aside the verdict of the jury and grant a new trial, and in refusing to hold the verdict of the jury to be contrary to the law and the evidence; and that the trial court erred in directing the



jury to return a verdict of not guilty on the wanton and wilful count and in taking said count away from the jury.

Only one witness for the plaintiff testified to the rate of speed, at which defendant's car was being driven at the time of the accident. Irvin Nicols, testified that he did not see the car when it was any distance away from the boy and estimated the speed of the car at forty or forty-five miles an hour. He testified that the boy let a car pass that was being driven East, that he looked both ways and continued to walk across, and witness did not see the car until just at the time it struck the boy. Several other witnesses testified to hearing the sound of the impact, but did not see either the boy or the car before the accident. There is no evidence in the record from which the jury could have reasonably drawn the inference that defendant wilfully and wantonly drove and propelled his car into plaintiff's intestate. In order to constitute wilful and wanton misconduct the injury must have been either intentionally inflicted or produced by acts so grossly negligent as to exhibit a reckless disregard for the safety of others. *Provenzano vs. I.C.R.R. Co.* 357 Ill. 192. The Court did not err in withdrawing the second count from the consideration of the jury.

It is argued by plaintiff, that the verdict of the jury is against the manifest weight of the evidence. The only other witness as to the speed of defendant's car, at the time of the accident other than Irvin Nicols, was the witness, James Oren Long, who testified on behalf of defendant that he estimated the speed of the car at twenty-five miles per hour. He was driving just behind defendant. Donald Watt, police officer at Collinsville, testified without objection, that he talked to defendant at the police station immediately after the accident and defendant stated to him that he saw plaintiff's intestate on the street at the black line and thought the boy would stay there, that the boy stopped there, and when defendant got close to him he then crossed in front of his car. Evidence as to a horn not being sounded by defendant, and the facts with reference to the



position of the boy's body and the car, after the accident, as bearing on the question of speed, were properly submitted to the jury. There is no assignment of error on the question of the admissibility of evidence, nor any contention that the Court erred in the giving of any instructions. The question of negligence and due care are matters to be determined by the jury, under the proper instruction of the Court. Hudson vs. Flatt, 194 Ill. App. 29; Kowalski vs. Kelley 183 Ill. App. 313; Sullivan vs. William Ohlhaver Co. 291 Ill. 359, aff'd. 214 Ill. App. 672; Johnson vs. Coey, 142 Ill. App. 147, aff'd. 237 Ill. 88; Berg vs. Mitchell, 196 Ill. App. 509; Hoobler vs. Voelpel 246 Ill. App. 69.

This case was tried twice, the first jury disagreeing, and the second returning a verdict in favor of defendant. They saw and heard the witnesses testify, and had an opportunity to see the various photographs which were introduced as exhibits in the case. On this record we are hardly in a position to say that their verdict was against the manifest weight of the evidence. Finding no reversible error in the record the judgment of the lower court will be affirmed.

AFFIRMED.

FILED

JUN 27 1942

David G. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



Abstract

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
May Term, A. D. 1942

Term No. 42F15

Agenda No. 15

GEORGE KIRCHNER,

Plaintiff and Appellee,

vs.

BORIS & DAVE GOLDENHERSH, INC.,
DAVE GOLDENHERSH and D. C.
WATSON,

Defendants and Appellants.

Appeal from the
Circuit Court of
St. Clair County,
Illinois.

315 I.A. 305²

DADY, J.

Plaintiff, George Kirchner, recovered a judgment by confession in the Circuit Court of St. Clair County against the defendants, D. C. Watson and Boris and Dave Goldenherish, Inc., a corporation, for \$418.69, on a note executed by the defendants payable to the order of William Kirchner Hardware Company, given as part payment for the purchase of refrigeration equipment by defendant, Watson. This appeal is taken from the order denying defendants' motion to open up such judgment.

Defendants contend the trial court erred in denying their motion to vacate on the ground that it sufficiently appears from the affidavits filed in support thereof that the defendants have a defense on the merits to plaintiff's demand. Two affidavits were filed. One was by defendant, Watson, and, so far as is material, stated that: "Upon the return of the refrigeration equipment, which was the consideration for the signing of the note upon which the above entitled cause is based, George Kirchner, * * * agreed to release defendants herein with the stipulation that your deponent buy some other refrigeration equipment, which was done, and for which prompt payment was made, and the cancellation of the note was made

verbally." The other affidavit was executed by Dave Goldenhersh, Secretary of the defendant corporation, and, so far as is material, stated that: "that shortly after the purchase thereof, the said refrigerator was returned to the plaintiff herein, at which time the defendant, D. C. Watson, agreed to purchase, and, this defendant is advised, did subsequently purchase from said William Kirchner Hardware Company additional equipment. *** At that time an agreement was made by the parties hereto and by the duly authorized representative of the said William Kirchner Hardware Company that because of and in consideration of the subsequent purchase of additional equipment by the said D. C. Watson that the defendants herein were to be released of any and all further liability on the said note and that the return of the equipment would be accepted in full payment of any and all obligations remaining due and that the said defendant corporation and the said D. C. Watson would be released of any and all further liability on this transaction and that the said note would be returned to the parties herein and that the said D. C. Watson would then proceed with the purchase of the additional equipment." The foregoing were all of the statements pertaining to a meritorious defense.

Plaintiff contends the affidavits do not comply with the requirements of Rules 15 and 26 of the Supreme Court, which rules govern motions to open a judgment by confession. Rules 15 and 26 when read together require that an affidavit in support of such a motion must be made on the personal knowledge of the affiant, must set forth with particularity the facts upon which the defense is based, and shall not consist of conclusions but of such facts as would be admissible in evidence, and it must affirmatively appear from such affidavit that if the affiant was sworn as a witness he could testify competently thereto.

The purpose of Rules 15 and 26 is to regulate and prescribe the procedure whereby a court may determine whether or not a defense exists. Where a defense raising a material issue of fact is set up the judgment will be opened and the issue so raised submitted to a

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOSEPH NEALE
OF THE BARR

IN TWO VOLUMES.
VOL. I.
BOSTON: PUBLISHED BY
JOSEPH NEALE, AT THE
PRINTING OFFICE OF
JOSEPH NEALE, NO. 10, NASSAU ST.
1822.

trial. The purpose of the rules is to prevent frivolous defenses and to defeat attempts to use formal pleadings as means to delay the recovery of just demands. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523.

The affidavits in this case, so far as they seek to set up a defense, consist principally of conclusions. The statement that it was agreed to release the defendants from further liability on the note in consideration of the return of the refrigeration equipment and the purchase of other equipment by defendant Watson, and that the cancellation of the note was made verbally, are pure conclusions. Odle v. Hoopeston Canning Co., 270 Ill. App. 432 at 440. The statement of the alleged agreement is defective in another respect. It does not affirmatively appear from either affidavit that the affiant could competently testify to the alleged facts stated therein.

The defendants must have been fully cognizant of the rules. Upon the denial of their motion to open up the judgment they made no attempt to file a different or more complete affidavit as to their defense. We are of the opinion that the trial court correctly ruled in denying the motion to open up the judgment.

For the reasons indicated the judgment below is affirmed.

Judgment affirmed.



Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1942

Agenda No. 18

Term No. 18

GUS GROSSMANN,

Plaintiff-Appellee,

-vs-

ALBERT R. DIESEL,

Defendant-Appellant.

Appeal from the

Circuit Court of

St. Clair County.

DADY, J.

315 I.A. 306

In an appeal from Justice Court, which was heard by the trial court without a jury, judgment was entered in favor of the plaintiff and against the defendant in the amount of \$300.00. Defendant brings this appeal.

Plaintiff was the owner of two mules which were struck by defendant's automobile and injured to such an extent that they had to be killed. Defendant does not question the amount of the judgment but contends that the trial court's findings are palpably against the weight of the evidence in that (1) that there is no evidence of due care on the part of the plaintiff, and (2) that there is no evidence of negligence on the part of the defendant.

The collision occurred at about 1:30 o'clock A. M. while defendant was operating his automobile in an easterly direction on a public highway. The travelled portion of the road was about 30 feet wide at the place of the collision and the surface had been oiled and scarified, some loose chat being scattered over it. The road as it approached the scene of the accident was straight with a few holes and dips in it and, for a distance of some 1320 feet west of the point of the accident, ran up-hill at an incline of 10 to 20 degrees. Defendant's car was on this up-grade when the accident occurred. On the south side of the road there was a ditch 2 to 3

feet in width and about 3 feet in depth, and immediately to the south of this ditch there was an embankment of some 5 to 6 feet in height. There was also a ditch and embankment on the north side of the road.

Plaintiff's farm house was located about 250 yards from the scene of the accident and the mules were kept in a lot which was located about 40 feet from the farm house. This lot was about 125 x 60 feet and was inclosed with a woven cyclone fence 5 feet high with barbed wire around the top. The fence had a gate and a chain with a snap on it. The snap had a heavy spring on it and it was necessary to pull the snap back in order to open the gate. After the accident plaintiff inspected the gate and found that it was partly open.

Defendant testified that he approached the scene of the accident at a speed of 45 to 50 miles per hour; that the night was dark but that his bright lights were on, and that with these bright lights he could see about 200 feet or more; that the lights did not light up very much farther than the travelled portion of the road and that he first saw the plaintiff's mules when they were about 10 feet away, as they were running out of the ditch on the south side of the road; that the mules ran toward the automobile about 5 to 6 feet; that upon seeing the mules he applied his brakes and swerved his car to the north, and that the car stopped within the distance of a car length. Defendant's testimony was corroborated by two witnesses who were passengers in the rear seat of defendant's car. There was no other eye witness to the accident except another passenger who was riding in the front seat with defendant and who died prior to the trial.

When defendant's car was brought to a stop one of the mules was lying a few feet in front of it. Plaintiff reached the scene of the accident before the car and this mule had been moved. Plaintiff testified that the defendant admitted to him that he "went too darn fast." Defendant testified that he did not "remember" this conversation. The headlights on defendant's car were broken, and plaintiff testified that there was glass from the headlights lying in the road

and extending for a distance of 90 feet from the place where the glass started to where such mule was lying.

One Bruehl testified that he overheard a conversation about a week after the accident in which defendant stated that "he thought he was going wide open; about 90," Bruehl testified that one Preutzel was present on the occasion of this conversation. Defendant denied the conversation, and Preutzel testified that he did not hear the defendant make the statement attributed to him.

The above is a fair statement of all of the material evidence bearing on the question of defendant's negligence. The trial court from this evidence found that the defendant was guilty of negligence which caused the damage and death of the two mules. This finding of the trial court is entitled to the same weight as the verdict of a jury, and will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. (People ex rel. Drainage Com'rs. v. C. & E. I. Ry. Co., 253 Ill. App. 535, 540; Keefer Coal Co. v. United Elec. Coal Cos., 291 Ill. App. 477, 486.) We think the evidence in this case was sufficient to justify a finding that defendant was negligent in the operation of his car at an excessive rate of speed and in failing to keep a proper look-out for animals which might be on the road. The plaintiff's mules were of normal size and although they may have come out of the ditch along the side of the road, there is still the question as to why the defendant was unable to see the animals until they were only 10 feet away.

As to the question of contributory negligence, plaintiff testified that he fed his horses and mules about 4:30 o'clock P. M. on the day of the accident; that he remembered closing the gate and fastening the latch; that no one else had any reason to go into the inclosure; that he never had any trouble before with the gate; that when he returned to his home at 1 o'clock on the morning of the accident, he could hear the mules eating hay; that the mules were not fence jumpers and that he had never had any trouble with them getting out of the inclosure prior to the time of the accident. Defendant

argues that plaintiff should be barred from recovering in this case on the theory that the plaintiff himself left the gate open inasmuch as no other person had rightful access to the lot, and the mules could not open the gate themselves. This conclusion is contradicted by the positive testimony of the plaintiff himself that he closed the gate at 4:30 o'clock P. M. when the mules were fed. The evidence presents a justifiable inference that the gate might have been opened by a stranger, and in such case plaintiff could not be charged with any negligence because of his failure to keep the gate closed. We think that the precautions taken by the plaintiff to keep his mules restrained were reasonable under the circumstances and that the trial court was justified in concluding from this evidence that the plaintiff had established the burden of showing due care on his part.

We find no error in the judgment and the judgment is accordingly affirmed.

Judgment affirmed.

FILED

JUN 27 1942

David J. Mallett

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



41810

ANITA GROSSEMAN,

Appellee,

v.

SAMUEL GROSSEMAN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

ON REHEARING.

315 I.A.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The opinion in this case is controlled by the opinion in Case No. 42016.

For the reasons stated, the orders of the Superior Court of Cook County are reversed and the cause remanded with directions to the Chancellor to enter an order requiring the defendant to pay to the plaintiff as temporary alimony the sum of \$15 per week, commencing September 29, 1939, and until the further order of the court; the sum of \$400 for temporary attorney's fees; \$300 as fees for her attorney's services in these appeals, and her expenses in these appeals not exceeding \$100, and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL AND KILEY, JJ. CONCUR.

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10. PROSECUTING ATTORNEY SHALL HAVE THE CHOICE IN THE CASE.
 The action in this case is controlled by the opinion in

Case No. 10010.

For the reasons stated, the order of the Probate Court
 of Cook County is reversed and the case remanded with directions
 to the Registrar to enter an order requiring the defendant to pay
 to the plaintiff the necessary attorney fees and of all her costs,
 commencing September 20, 1909, and until the further order of the
 court; the sum of \$100 for necessary attorney's fees; \$1000 as
 costs for her attorney's services in these respects, and her expenses
 in these respects not covered by the sum of \$100, and for further proceedings
 not inconsistent with this opinion.

ORDERED AND REMANDED WITH DIRECTIONS.

WILLIAM A. RILEY, J. CLERK.

41810

ANITA GROSSMAN,

Appellee,

v.

SAMUEL GROSSMAN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

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MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The opinion in this case is controlled by the opinion in case No. 42016.

For the reasons stated in the opinion in case No. 42016, the orders of the Superior Court of Cook County are reversed and the cause remanded with directions to the Chancellor to enter an order requiring the defendant to pay to the plaintiff as temporary alimony the sum of \$15 per week, commencing September 29, 1939, and until the further order of the court; the sum of \$400 for temporary attorney's fees; \$300 as fees for her attorney's services in these appeals, and her expenses in these appeals not exceeding \$100, and for further proceedings not inconsistent with the opinion in case No. 42016.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL AND KILEY, JJ. CONCUR.

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WITH CORRECTION

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LEO P. HARRIS,

315 I.A. 80²
APPEAL FROM

Appellee,

v.

CIRCUIT COURT

OXFORD METAL SPINNING CO., INC.,

COOK COUNTY.

Appellant.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is a suit in attachment brought by plaintiff, Leo P. Harris, against the defendant, Oxford Metal Spinning Co., Inc., a foreign corporation, which has no office in the State of Illinois, but whose principal office is located in Philadelphia, Penn. Several customers of defendant were also named as garnishees. Plaintiff sued to recover commissions claimed to be due him under a written contract of employment for the sales made during the months of July, August and September, 1940. On April 4, 1941, before trial, the court entered an order on defendant to file a sworn list of documents in its possession material to the issues. Defendant did file a sworn list of documents and subsequently an order was entered on defendant to produce said documents for the plaintiff's inspection. Thereafter, on plaintiff's petition, a rule to show cause was entered requiring defendant to show why it had failed to produce said documents for plaintiff's inspection. On the return of the rule, plaintiff filed a petition to strike the defendant's pleadings and asked for judgment on his complaint. An order was entered striking defendant's answer and judgment was entered against defendant, and plaintiff's damages assessed in the sum of \$1,920.16, because the defendant had allegedly failed to comply with the court's order to produce the documents contained in the sworn list. The cause now comes to this court on appeal from that order, no trial ever having been had on the merits.

It appears from the record that defendant employed the plaintiff as a travelling salesman under a written contract for a term of two years, beginning January 1, 1939, and agreed to pay him for his services certain stipulated rates of commission based on sales.

3131A.100

LEO J. HARRIS

Appellant

OTIS METAL FINISHING CO., INC.

Appellant

U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

This is a writ in attachment brought by Plaintiff, Leo J. Harris,

against the defendant, Otis Metal Finishing Co., Inc., a

foreign corporation, which has an office in the State of Illinois,

but whose principal office is located in Philadelphia, Penn. Several

customers of defendant were also named as defendants. Plaintiff sued

to recover commissions claimed to be due him under a written contract

of employment for the sales made during the months of July, August

and September, 1940. On April 4, 1941, before trial, the court entered

an order on defendant to file a sworn list of documents in its

possession material to the issues. Defendant did file a sworn list

of documents and subsequently an order was entered on defendant to

produce said documents for the Plaintiff's inspection. Thereafter,

on Plaintiff's petition, a rule to show cause was entered requiring

defendant to show why it had failed to produce said documents for

Plaintiff's inspection. On the return of the rule, Plaintiff filed

a petition to strike the defendant's pleadings and asked for judgment

on his complaint. An order was entered striking defendant's answer

and judgment was entered against defendant, and Plaintiff's damages

assessed in the sum of \$1,280.18, because the defendant had allegedly

failed to comply with the court's order to produce the documents

contained in the sworn list. The cause now comes to this court on

appeal from that order, no trial ever having been had on the merits.

It appears from the record that defendant employed the

plaintiff as a traveling salesman under a written contract for

term of two years, beginning January 1, 1939, and agreed to pay him

for his services certain stipulated rates of commission based on sales.

Plaintiff's action is for commission due him under the contract for the 3-month period beginning July 1, 1940, and ending September 30, 1940. The 7th paragraph of the contract provides:

"7. Omsco (the defendant) further agrees that it will make and render unto Harris a true and proper account of all sales made by Omsco in furtherance of orders procured or renewals of orders procured by Harris. These accounts shall be rendered to Harris quarterly, at which time, calculations of the commissions payable to Harris shall be made."

On December 11, 1940, the trial court entered an order directing defendant to file a sworn list of documents relating to the merits of the matter in question in this cause. Pursuant to that order, the defendant, on December 31, 1940, filed a sworn list of documents, designated therein as items 1 to 9 under Schedule I, which defendant was willing to produce, and certain other documents designated as items 1 to 8 under Schedule II, which defendant was unwilling to produce. On April 4, 1941, the trial court entered the following order:

"The court hereby orders the defendant to produce within 10 days, and permit plaintiff's attorney to inspect, and make copies of, the following documents listed in Schedules I and II of defendant's affidavit of documents: (a) The 'Sales records' listed as item 9 in Schedule I. (b) All documents listed in Schedule II."

The documents as listed by defendant in Schedule II are as follows:

"1. Bills. 2. Accounts. 3. Journals. 4. Ledgers. 5. Invoices. 6. Shipping tickets. 7. Bills of lading. 8. Other records."

On April 18, 1941 the plaintiff filed a motion for a rule to show cause supported by the affidavit of the attorney actively engaged in the presentation of plaintiff's case, which averred that the defendant had failed and refused to comply with the order of Court entered April 4, 1941 and had not produced any or either of the documents required to be produced by said order. On May 13, 1941, an order was entered requiring defendant to appear before the Court on May 23, 1941 to show cause why it should not be held in contempt for failure to comply with the said order of April 4, 1941. On June 9, 1941, plaintiff presented a petition for an order of court striking

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Plaintiff's action is for commission and his under the contract for
the 3-month period beginning July 1, 1940, and ending September 30,
1940. The 7th paragraph of the contract provides:

"7. Omeco (the defendant) further agrees that it will make
and render unto Harris a true and proper account of all sales made by
Omeco in furtherance of orders placed or renewed or orders procured
by Harris. These accounts shall be rendered to Harris quarterly, at
which time, calculations of the commission payable to Harris shall
be made."

On December 11, 1940, the trial court entered an order
directing defendant to file a sworn list of documents relating to the
merits of the matter in question in this cause. Pursuant to that
order, the defendant, on December 21, 1940, filed a sworn list of
documents, designated therein as items 1 to 8 under Schedule I,
which defendant was willing to produce, and certain other documents
designated as items 1 to 8 under Schedule II, which defendant was un-
willing to produce. On April 4, 1941, the trial court entered the
following order:

"The court hereby orders the defendant to produce within
10 days, and permit Plaintiff's attorney to inspect, and make copies
of, the following documents listed in Schedules I and II of defendant's
affidavit of documents: (a) The 'sales records' listed as item 8
in Schedule I. (b) All documents listed in Schedule II."

The documents as listed by defendant in Schedule II are as follows:
1. Bills. 2. Accounts. 3. Journals. 4. Ledgers. 5. Invoices.

6. Shipping tickets. 7. Bills of lading. 8. Other records."

On April 18, 1941 the Plaintiff filed a motion for a writ

to show cause supported by the affidavit of the attorney actively
engaged in the presentation of Plaintiff's case, which averred that
the defendant had failed and refused to comply with the order of court
entered April 4, 1941 and had not produced any or either of the docu-
ments required to be produced by said order. On May 13, 1941, an

order was entered requiring defendant to show cause why it should not be held in contempt for
May 13, 1941 to show cause why it should not be held in contempt for
failure to comply with the said order of April 4, 1941. On June 5,
1941, Plaintiff presented a petition for an order of court requiring

defendant's answer and for judgment. On June 11, 1941, the court entered the order appealed from, which contained the following finding of fact;

"That the defendant has not hitherto complied with the order of court entered on April 4, 1941, and has persistently, willfully, intentionally and contumaciously refused, and still refuses, so to do."

It appears from the certificate of the trial judge attached to the report of proceedings as amended on November 5, 1941, as follows:

"And forasmuch as the matters and things above set forth do not otherwise fully appear of record in this cause, the defendant tenders this report of all the proceedings had at the hearing on June 11, 1941, being one of eight hearings had before this court in relation to the defendant's failure and refusal to comply with the order of this court entered on April 4, 1941; and prays that the same may be certified under the hand and seal of the judge of this court, and thereby made a part of the record in such cause;

"Which is accordingly done this 6th day of August, A.D. 1941.
Harry M. Fisher (Seal)
Judge of the Circuit Court."

It is contended by plaintiff that throughout defendant's brief there are recitals of alleged facts that are dehors the record. As examples, plaintiff points to defendants statements, as follows;

"The accounts payable Ledger, Cash Book and correspondences were afterwards produced . . . June 5, 1941, on the hearing of the rule to show cause it was stated to the Court by the plaintiff's attorney that a notation, 'J 63 B' on a sheet of the general ledger which had been impounded by a prior order of the court was fraudulent, although plaintiff offered no evidence except the sheet itself in support of that statement. . . No other evidence was offered in support of plaintiff's petition."

At the time of the filing of the complaint, the plaintiff alleged "that all the books and records of the aforesaid sales are in the exclusive possession and control of the defendant and are unavailable to plaintiff". Plaintiff states that, therefore, he had no records which he could offer in evidence to support his claim, except those records which he or his attorney afterwards obtained from defendant. The defendant had no office or place of business in Illinois, and all of its records were in Philadelphia. The defendant claims that the records called for were voluminous and as a matter of fact were all of the records of defendant for the

defendant's answer and for judgment. On June 11, 1941, the court

entered the order appealed from, which contained the following

finding of fact:

"That the defendant has not hitherto complied with the order of court entered on April 4, 1941, and has repeatedly, willfully, intentionally and contumaciously refused, and still refuses, so to do."

It appears from the certificate of the trial judge attached

to the report of proceedings as rendered on November 5, 1941, as follows:

"And forasmuch as the matters and things above set forth do not otherwise fully appear of record in this cause, the defendant tenders this report of all the proceedings had at the hearing on June 11, 1941, being one of which he rings had before this court in relation to the defendant's failure and refusal to comply with the order of this court entered on April 4, 1941; and prays that the same may be certified under the hand and seal of the judge of this court, and thereby make a part of the record in such cause;

"which is accordingly done this 5th day of August, A. D. 1941. Harry M. Fisher (deft.) Judge of the Circuit Court."

It is contended by plaintiff that throughout defendant's

brief there are recitals of alleged facts that are dehors the record.

As exemplified, plaintiff points to defendant's statement, as follows:

"The records payable last, Cash book and correspondence were afterwards produced . . . June 5, 1941, on the hearing of the rule to show cause it was stated to the Court by the plaintiff's attorney that a notation, '103' on a sheet of the general ledger which had been furnished by a prior order of the court was furnished, although plaintiff offered no evidence except the sheet itself in support of that statement. . . . no other evidence was offered in support of plaintiff's petition."

At the time of the filing of the complaint, the plaintiff

alleged "that all the books and records of the aforesaid sales are

in the exclusive possession and control of the defendant and are

unavailable to plaintiff". Plaintiff states that, therefore, he

had no records which he could offer in evidence to support his claim,

except those records which he or his attorney afterwards obtained

from defendant. The defendant had no office or place of business

in Illinois, and all of its records were in Philadelphia. The

defendant claims that the records called for are voluminous and

as a matter of fact were all of the records of defendant for the

months in question; that as a practical proposition it was not easy to comply with the order; and that it meant the searching for and finding and then subsequently shipping a great number of records from Philadelphia to Chicago. It is admitted that on April 18, 1941, when the motion was made (two weeks after the entry of the first order) that the defendant had not produced all of the documents called for in the order. However, defendant urges that after the filing of the motion for the rule to show cause, the defendant did produce all of the documents for the plaintiff's inspection, and that the proceedings after April 18, 1941, clearly support this contention.

Defendant's theory of the case as stated in its brief is that the defendant did comply with the order of court of April 4, 1941 to produce the documents contained in defendant's sworn list. The trial court found that defendant did not comply with the order. The question presented on this appeal is concisely stated by defendant's brief, as follows: "This appeal is primarily concerned with the question of whether the defendant complied with this order". This court is asked to determine whether a finding of the trial court is sustained by the evidence, - by evidence presented before the trial court on hearings that are not incorporated in the trial court record. This court is presented with a problem as arose in National Builders Bank v. Simmons, 304 Ill. App. 471, where it was said;

"This court is now confronted with the problem of deciding an issue of fact without knowing whether the evidence presented for our consideration is all that was heard by the trial Judge."

In the instant case there were in fact seven hearings "in relation to the defendant's failure and refusal to comply with the order", that are not contained in the report of proceedings. The presumption is that the finding of the trial court was justified by the evidence presented to the court on these hearings. In Garrity v. Hamburger, 136 Ill. 499, the Supreme Court said;

"It has always been the law of the State, that if a bill of exceptions did not state that it contained all the evidence, a court of review would presume that the decision of the lower court which could be was justified by evidence not shown, if that shown was not sufficient."

months in question; that as a practical proposition it was not easy to comply with the order; and that it meant the searching for and finding and then subsequently shipping a great number of records from Philadelphia to Chicago. It is admitted that on April 16, 1941, when the motion was made (two weeks after the entry of the first order) that the defendant had not produced all of the documents called for in the order. However, defendant argues that after the filing of the motion for the rule to show cause, the defendant did produce all of the documents for the plaintiff's inspection, and that the proceedings after April 16, 1941, clearly support this contention.

Defendant's theory of the case as stated in its brief is that the defendant did comply with the order of April 4, 1941 to produce the documents contained in defendant's sworn list. The trial court found that defendant did not comply with the order. The question presented on this appeal is conclusively stated by defendant's brief, as follows: "This appeal is primarily concerned with the question of whether the defendant complied with this order." This court is asked to determine whether a finding of the trial court is sustained by the evidence, - by evidence presented before the trial court on hearing that was not incorporated in the trial court record. This court is presented with a problem as arose in National Builders Bank v. Limong, 304 Ill. App. 471, where it was said:

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In the instant case there are in fact seven hearings "in relation to the defendant's failure and refusal to comply with the order," that are not contained in the report of proceedings. The presentation is that the findings of the trial court are justified by the evidence presented to the court on these hearings. In Barry v. Barry, 136 Ill. 437, the supreme court said:

"It has always been the law of the State, that if a bill of exceptions did not state that it contained all the evidence, a court of review would presume that the decision of the lower court which could be sustained by evidence not shown, it is not shown, was not sufficient."

Then again, in the National Builders Bank case (supra), this court said;

"We have carefully inspected the record in this case and we cannot find a certificate by the trial judge as to the evidence which was heard and presented to this court, as being all the evidence which was heard by him in reaching a decision of this case. We are inclined to believe now that we should have dismissed this suit upon said motion at the time it was made."

In the case at bar, it is suggested by plaintiff that the result will be the same whether the appeal be dismissed or the order appealed from be affirmed, but as a motion has been taken with the case, it is suggested that the decision of this court ought to be that the appeal is dismissed.

Plaintiff contends that the Statements in defendant's brief as to matters that are dehors the record cannot be considered by this court, and then goes on to point out several statements that are not based on the record as follows;

"1. 'As a practical proposition, it was not easy to comply with the order. It meant searching for and finding and then subsequently shipping a great number of records.'"

"2. 'However, after the filing of the motion for the rule to show cause, the defendant did produce all the documents for the plaintiff's inspection.'"

"3. 'Subsequently, the defendant also produced for the plaintiff's inspection the accounts payable ledger, the cash receipt book, cash disbursement book and the correspondence.'"

"4. 'No evidence was offered on the hearing, nor did any one contend that the facts set out in the affidavit filed on behalf of the defendant were not true.'"

"5. 'The hearing on the rule to show cause entered on May 13, 1941, was held on June 5, 1941; at said hearing, Mr. Finder made the bold statement that a certain notation 'J 63 B', appearing in the defendant's ledger, which had been impounded, was fraudulent. Although no evidence was taken on this point, and it did not appear wherein it was material.'"

"6. 'On June 5, 1941, 'the court instructed him to file a petition to strike the defendant's pleading and to ask for judgment.'"

"7. 'The hearing on the last mentioned petition, and the affidavit appearing on pages 33-37 of the abstract, was had on June 11, 1941.'"

"8. The 'invoices alone included all sales made on which the plaintiff claimed commissions and therefore, of themselves should have been sufficient for the plaintiff's purposes.'"

Then again, in the McClure v. McCall case (1911), this court said:

"We have carefully inspected the record in this case and we cannot find a certificate by the trial judge as to the evidence which was heard and presented to this court, as being all the evidence which was heard by him in reaching a decision of this case. We are inclined to believe now that we should have dismissed this writ upon said motion at the time it was made."

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Plaintiff contends that the statements in defendant's brief as to matters that are before the record cannot be considered by this court, and then goes on to point out several statements that are not based on the record as follows:

"1. 'As a practical proposition, it was not easy to comply with the order. It meant searching for and finding and then subsequently shipping a great number of records.'"

"2. 'However, after the filing of the motion for the rule to show cause, the defendant did produce all the documents for the plaintiff's inspection.'"

"3. 'Incidentally, the defendant also produced for the plaintiff's inspection the accounts payable ledger, the cash receipt book, cash disbursement book and the correspondence.'"

"4. 'No evidence was offered on the hearing, nor did any one contend that the facts set out in the affidavit filed on behalf of the defendant were not true.'"

"5. 'The hearing on the rule to show cause entered on May 15, 1941, was held on June 1, 1941, at said hearing, Mr. Fisher made the bold statement that a certain notation 'J. C. B.' appearing in the defendant's ledger, which had been introduced, was fraudulent. Although no evidence was taken on this point, and it did not appear wherein it was material.'"

"6. 'On June 3, 1941, the court instructed him to file a petition to strike the defendant's pleading and to ask for judgment.'"

"7. 'The hearing on the last mentioned petition, and the affidavit submitted on pages 22-23 of the exhibit, was had on June 21, 1941.'"

"8. 'The invoices alone included all sales made on which the plaintiff claimed commission and interest, of themselves should have been sufficient for the plaintiff's purpose.'"

"9. 'The trial judge acted arbitrarily and abused his discretion in having accepted the statement of counsel for the plaintiff without any proof having been offered in support thereof.'"

"10. 'It is hard to understand how the attorney for the plaintiff and the trial judge could, by merely glancing at this sheet, determine that it had been inserted in the ledger. It must be remembered that no evidence of any kind as to the lack of genuineness of said sheet was offered on behalf of the plaintiff.'"

"11. 'It appears on its face to have been compiled in the regular course of business of the defendant.'"

"12. 'The defendant vehemently denied that any insertions were made in its general ledger.'"

If as this court has found, and has so stated in the opinion, that all the evidence is not contained in the record or report of proceedings, a presumption arises that the trial court was justified by the competent evidence presented to the court on the several hearings, in entering judgment for plaintiff. This court will not consider the questions involved so far as they are affected by the statements which are not based on the record. In People v. Evanston Ry. Co., 323 Ill. 109, it was said;

"These facts may be as stated by appellant, but there is no proof in the record that shows them to be true. This court can only look to the record of the trial court in determining the issues between the parties and the facts proved, and cannot take into consideration facts asserted dehors the record and that are only brought to our attention by mere statements of counsel in the briefs. (Hass Electric Co. v. Amusement Co., 236 Ill. 452)."

Upon a like question the court said in Hiarod Coal Co. v. Beckwith, 111 Ill. App. 379;

"Without any evidence in the record to sustain the statement, counsel for plaintiff say in their brief in this court that a casualty company is the real defendant; that the case is being defended by the casualty company, whose chief counsel represent the appellant, etc. Statements of this character made in the trial court were held to be reversible error in Fuller v. Barragh, 101 Ill. App. 684. It is unnecessary to comment upon the ethics of a practice of pursuing a course of conduct in a court of review which would be reversible error in the court below."

Therefore, upon the question called to our attention, this court will be controlled solely by matters appearing in the record and will not consider facts discussed dehors the record.

Another question to be considered is defendant's contention that "the allegations contained in plaintiff's affidavit to strike the defendant's pleading and for judgment are insufficient." The

"9. The trial judge stated explicitly and clearly his discretion in having accepted the statement of counsel for the plaintiff without any proof having been offered in support thereof."

"10. It is hard to understand how the attorney for the plaintiff and the trial judge could, by merely glancing at this sheet, determine that it had been inserted in the ledger. It must be remembered that no evidence of any kind as to the lack of genuineness of said sheet was offered on behalf of the plaintiff."

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323 Ill. 109, it was said:

"These facts may be as stated by appellant, but there is no proof in the record that shows that to be true. This court can only look to the record of the trial court in determining the issues between the parties and the facts proved, and cannot take into consideration facts asserted before the record and not the only proof to our attention by the statement of counsel in the debate. (See People Co. v. Amusement Co., 323 Ill. 499.)"

Upon a like question the court said in People Coal Co. v. People,

111 Ill. 444, 375:

"Without any witness in the record to sustain the statement, counsel for plaintiff say in their brief in this court that a certain entry in the defendant's ledger is the only evidence by the generally competent, those chief counsel represent the defendant. It is to be remembered that in the trial court there was no evidence of any kind as to the lack of genuineness of said sheet, and that no evidence of any kind as to the lack of genuineness of said sheet was offered on behalf of the plaintiff."

Therefore, upon the question called to our attention, this court will be controlled solely by matters appearing in the record and will not consider facts alleged before the record.

Another question to be considered is defendant's contention that "the allegations contained in plaintiff's affidavit to strike the defendant's pleading are insufficient."

authority vested in the court to strike pleadings and to enter judgment are derived from Section 3 of Rule 17 of the Supreme Court, which provides as follows;

"(3) Inspection of Documents Listed in Schedule 2 - Refusal of Production. As to documents listed on schedule 2, the party wishing discovery may apply to the court by motion for an order that any or all of the documents so listed shall be produced for inspection and to be copied, at a time and place and in a manner to be fixed in the order, and if such order shall be made, and if such production shall be refused by the party listing said documents or by any other party at the instance of or by collusion with the party listing them, a motion may be made for, and the court may enter an order that the party listing such documents shall be nonsuited or his complaint dismissed, or that any pleading or part thereof filed by him shall be stricken out and judgment rendered accordingly, or that he may be debarred from maintaining any particular claim, defense, recoupment, set-off, or counterclaim or replication, respecting which discovery is sought."

It appears from sections 2 and 3 of said Rule that an affidavit is not required. These sections provide that upon refusal by a party to produce any of the documents listed by him, "a motion may be made for, and the court may enter an order * * * that any pleading or part thereof filed by him shall be stricken out and judgment entered accordingly." Upon the conclusion of the hearings, the order appealed from could properly have been entered upon an oral motion or the court may have entered the order sua sponte. Moreover, one of the allegations in the petition corresponds with the finding that is challenged by the defendant's appeal. The 10th paragraph of the petition reads as follows: "That the defendant has not heretofore complied with said order of April 4, 1941, but has steadfastly, wilfully and intentionally failed and refused so to do." This allegation is substantially the same as the finding complained of.

It is urged that the defendant's refusal to produce the records specified in its sworn list of documents, is an admission of the matters charged in the complaint. As has been called to our attention, the purpose of a proceeding for summary judgment is to determine whether a defense exists; but in a proceeding under sections 2 and 3 of Rule 17, the pleading is stricken out and judgment rendered on the legal presumption that the refusal to produce evidence material to the administration

authority vested in the court to refuse production and to enter judgment there derived from Section 5 of Rule 17 of the Supreme Court, which provides as follows:

"(3) Inspection of documents listed in Schedule 2 - Refusal of production. As to documents listed on Schedule 2, the party wishing discovery may apply to the court by motion for an order that any or all of the documents so listed shall be produced for inspection and to be copied, at a time and place and in a manner to be fixed in the order, and if such order shall be made, and if such production shall be refused by the party listing said documents or by any other party at the instance of or by collusion with the party listing them, a motion may be made for, and the court may enter an order that the party listing such documents shall be non-suited or his complaint dismissed, or that any pleading or part thereof filed by him shall be stricken out and judgment rendered accordingly, or that he may be separated from maintaining any particular claim, defense, recovery, set-off, or counterclaim or relief thereon, respecting which discovery is sought."

It appears from sections 1 and 3 of said Rule that an affidavit is not required. These sections provide that upon refusal by a party to produce any of the documents listed by him, "a motion may be made for, and the court may enter an order " * * * that any pleading or part thereof filed by him shall be stricken out and judgment entered accordingly." Upon the conclusion of the hearing, the order appealed from could properly have been entered upon an oral motion or the court may have entered the order ex parte. Moreover, one of the allegations in the petition corresponds with the finding that is challenged by the defendant's appeal. The 10th paragraph of the petition reads as follows: "That the defendant has not heretofore complied with said order of April 4, 1941, but has repeatedly, wilfully and intentionally failed and refused to do so." This allegation is substantially the same as the finding concluded of.

It is urged that the defendant's refusal to produce the records specified in its sworn list of documents, is an admission of the matters charged in the complaint. As has been pointed out previously, the purpose of a proceeding for summary judgment is to determine whether a defense exists; but in a proceeding under sections 2 and 3 of Rule 17, the pleading is stricken out and judgment rendered on the legal presumption that the refusal to produce evidence referred to in the administration

"This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceedings here taken may therefore find its sanction in the undoubted right of a law making power to create a presumption of a fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, " * * *."

The court in that opinion further said:

"And, beyond peradventure, the general course of legislation and judicial decision in the several States indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed."

of due process was put in violation of the want of merit in the asserted defense. Upon the trial of defendant's answer, the defendant was in default and the court could properly enter a judgment upon such default in favor of the plaintiff. In the case of Hammond v. United States, 115 U.S. 1292, the United States Supreme Court stated that questions of like importance that apply in the instant case. In that case plaintiff in error contended that the action of the trial court in making the order to produce, and in failure to comply therewith, striking the pleadings of the Hammond Company from the files and rendering a judgment as by default, was void, because it constituted a taking of property without due process. In sustaining the order, the court said:

"This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceedings here taken are therefore void. The question in the undisputed right of a law making power to create a presumption of a fact as to the bad faith and untruth of an answer depends from the suppression or failure to produce the proof ordered, when such proof concerned the right of decision of the court. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the general source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hayes v. Moffitt, and the power exerted in this case is as follows: In the former the process of law was denied by the refusal to hear. In this the preservation of the process was secured by the presumption that the refusal to produce evidence material to the administration of the process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to the process, to preserve in the one and to deny and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for contempt because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering."

The court in that opinion further said:

"And, beyond peradventure, the general course of legislation and judicial decision in the several States indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by process issued in conformity with the legislative authority, and for a failure to give or produce such evidence, the law might authorize a presumption in proper cases against the party refusing, justifying the rendering of a judgment by default, as it no answer had been filed."

So, considering defendant's contention that the court was not justified in entering judgment for plaintiff, we are of the opinion that the court was justified, since, as provided for by the Rules of the Supreme Court of our State, where a defendant refuses to produce the documents called for by an order of court to produce, the court may in a proper case strike the pleadings affected and enter judgment as in the case of default. These being the facts in the instant case, the court was fully justified, we believe, in assessing plaintiff's damages in the sum of \$1920.16, and the judgment in this action is, therefore, affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

10, considering defendant's contention that the court was not justified in entering judgment for plaintiff, we are of the opinion that the court was justified, since, as provided for by the rules of the Supreme Court of our State, where a defendant refuses to produce the documents called for by an order of court to produce, the court may in a proper case strike the defendant's pleadings and enter judgment as in the case of default. These being the facts in the instant case, the court was fully justified, we believe, in rendering judgment for plaintiff in the sum of \$100.00, and the judgment in this action is, therefore, affirmed.

WITNESSES.

WILLIAM P. L. AND ELLY, J. JUDGE.

42091

PEOPLE OF THE STATE OF ILLINOIS,
ex rel, VIRGINIA BONDY,

Plaintiff - Appellee,

v.

WALTER MOREY,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF EVANSTON.

315 I.A. 491

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is a bastardy complaint filed in the Municipal Court of Evanston on April 18, 1941, by one Virginia Bondy, alleging that the defendant is the father of a child born to her on May 6, 1941. The case having been heard before a jury, the verdict was entered against the defendant, and judgment on the verdict finding the defendant guilty was entered by the court.

The relatrix was nineteen years old and unmarried. She had known defendant for at least three years, and during the first two years had seen him only occasionally. According to her testimony, in May 1940 the defendant began seeing her regularly and in that month asked her to go steady with him and not go out with anyone else, and she agreed and said she would do as he wanted her to do; and that she went steady with him until after Christmas 1940 and during that time she did not go out with other men; that beginning in May, 1940 the relatrix saw the defendant nearly every night, either at her home, or at the store at which she was employed; that he continued to see her and go out with her almost every night during the months of June, July, August and September, 1940 and during those months was at her home frequently, and as often as four or five times a week.

On August 8, 1940, it appears that he called for her at the Kenilworth store of Peacock Cleaners, where she was employed. He drove her home and parked the car near her house, pushed her into the back seat of the automobile, and had intercourse with her, although she testified that she tried to prevent it. When she told him they

THE STATE OF VIRGINIA,
COUNTY OF SPOTSYLDEN.

Plaintiff - Defendant,

v.

Defendant - Plaintiff.

Defendant - Plaintiff.

BEFORE ME, JUDGE JOHN W. HARRIS, Clerk of the Court.

This is a custody case filed in the Circuit Court of the County of Spotsylvania, Virginia, on April 12, 1951, by one Virginia Harris, Plaintiff, against one John W. Harris, Defendant. The Defendant is the father of a child born to her on May 3, 1951. The case having been heard before a jury, the verdict was entered against the Defendant, and judgment on the verdict finding the Defendant guilty was entered by the court.

The Plaintiff was nineteen years old and unmarried. She had known Defendant for at least three years, and during the first two years had seen him only occasionally. According to her testimony, in May 1950 the Defendant began seeing her regularly and in that month asked her to go ahead with him and not go out with anyone else, and she agreed and said she would do so as wanted her to do; and that she went ahead with him until after Christmas 1950 and during that time she did not go out with other men; that sometime in May, 1951 the Plaintiff saw the Defendant nearly every night, either at her home, or at the store at which she was employed; that he continued to see her and go out with her almost every night during the months of June, July, August and September, 1950 and during those months at her home frequently, and at least ten or fifteen times a week. On August 2, 1950, it appears that he called for her at the Kentworth store at Spotsylvania, where she was employed. He drove her home and parked the car near her house, opened her into the back seat of the automobile, and had intercourse with her, although she testified that she tried to prevent it. When she told him they

should wait until after they were married, he said "We will be". On August 10, 1940 he again called for her at the store, drove to a point near her home, parked the car, pushed her in the back seat, repeated his advances and had intercourse with her. On August 15, 1940, August 25, 1940, and August 27, 1940, the occurrence was repeated under practically the same circumstances, as testified to by relatrix. The relatrix told defendant they would have to get married and he said "Don't worry; don't let it worry you; we will do so."

Relatrix further testified that she had not had intercourse with any other man; that she told defendant on August 16th and on August 25th, that she thought she was pregnant, and he said "Oh, I don't think so, you could not get that way so sudden;" and that he said "Don't say anything to anybody about it yet, we will get married and we can tell them then." That in September she was sure she was pregnant and told defendant she was sure she was going to have a baby and that she was a month along. That from September, 1940 until Christmas of that year defendant continued to go steady with relatrix and called at her home, as often as five times a week. She did not see him after January 1st, 1941 until February 22nd, when he came to the store at which she was employed, in response to a letter from her. She told him the child was to be born in April; that he told her they would be married on March 1st; asked for her birth certificate, in case it should be required for obtaining a marriage license, and no birth certificate being available, he examined her baptismal certificate and copied the information contained therein. Further, that on March 1st, defendant called and said he could not see the relatrix and she did not see him during the entire month of March; that in April she wrote him a letter, and on the 16th of that month, the sister of relatrix called his home, and when he called back, she asked him to come to their home, which he did that night; and that relatrix, her sister, her sister's husband and defendant were present. The defendant was then asked by the sister's husband "What are you going to do about

[illegible]

it" and he answered "I will marry her if I am the father, but I don't think I am." That in response to a question by the sister of the relatrix as to what he planned to do, he said "I don't know what the best thing is, but if I am the father I will marry the girl"; that he was then asked if he was the father and he replied "I don't know, I am not sure". The defendant admitted that in the above conversation, in response to a question by relatrix's sister as to what he was going to do about it, he stated to her that "if I were positive it was mine, I would do something; it was not mine, so I would do nothing about it". The child was born on May 6, 1941, and was not premature.

Defendant points to the evidence and contends that a bastardy proceeding is a quasi criminal proceeding and it is incumbent upon the State to prove its case by a preponderance of the evidence and the relatrix has the burden of establishing the parentage of the child. It is pointed out that relatrix testified that from May 8, 1940, to the time of the trial, she had not been out with any man other than defendant, and that Robert D. Warmington, a witness, testified that he attended the New Trier graduation ceremonies with her in the month of June, 1940, and further that he had occasion to date her the latter part of June or some time in July. Another witness, Miss Mary Ludwig, testified that she dated with relatrix when she was out with other boys, other than Walter Morey, during the months of June, July and August, 1940. She stated that this happened about two times and that they went out for rides on those occasions. She did not recall who relatrix "was dating with", but she was certain that it was not Walter Morey. Defendant denied that he had been going steady with relatrix from May 8, 1940, but stated that the first time he had been out with her during 1940 was in the second week of August. It is contended, therefore, by defendant that the doubtful character of the evidence adduced by relatrix required a reversal of the judgment. However, we cannot agree with defendant's contention, but are of the opinion that it was a question for the jury to pass upon as to the credibility and weight of the evidence presented. In support of the contention that

the evidence was insufficient to support the verdict and judgment, defendant cites People v. Engert, 202 Ill. App. 229, where the court held that the evidence was insufficient to sustain a judgment against the defendant where such evidence showed that the relatrix had been out riding with others than the defendant prior to the time of any acts of intercourse. Upon this same question of the sufficiency of the evidence, defendant cites People v. Frowley, 185 Ill. App. 338; People v. Cutler, 200 Ill. App. 469; and People v. Rhoads, 198 Ill. App. 537.

The State on the other hand contends that the verdict and judgment are amply supported by the evidence and goes on to point out the testimony of the various witnesses, and states that counsel for defendant devotes a great deal of space to the proposition that it was impossible for these parties to have had intercourse, if they were in the positions described by relatrix. It is urged that that conclusion is pure guess-work on the part of counsel; that the relatrix testified positively that the acts were committed, and that whether or not her description of the positions assumed by the parties, is entirely accurate and sufficiently clear to present a complete and comprehensive picture, it certainly cannot be said as a matter of fact that the performance of the several acts was impossible, nor can this court so hold as a matter of law. And it is urged that counsel's guesses and conjectures must give way before the positive testimony of the relatrix. As also suggested, it has been repeatedly held in this state that in bastardy proceedings, it is immaterial on what particular days the acts of intercourse took place, or on what date the prosecutrix became pregnant, the material question to be determined being whether or not the defendant is the father of the child. (People v. Coleman, 200 Ill. App. 610). Of course, in a bastardy proceeding it is incumbent upon the State to prove its case by a preponderance of the evidence and the relatrix has the burden of establishing the parentage of the child. However, upon the facts in this record it is apparent that there is sufficient evidence upon which the jury could

the witness was instructed to report the verdict and judgment.
defendant cited People v. [illegible], 100 Ill. App. 2d, where the court
said that the witness was instructed to testify as to what he saw
and heard, and that the witness should not be asked to testify as to
what he thought or felt. When this was questioned of the testimony of
the witness, defendant cited People v. [illegible], 100 Ill. App. 2d;
People v. [illegible], 100 Ill. App. 2d; and People v. [illegible], 100 Ill.
App. 2d.

The state on the other hand contends that the verdict and
judgment are fully supported by the evidence and does not require
the testimony of the various witnesses, and states that because the
defendant avows a great deal of space to the proposition that it
was impossible for these parties to have had intercourse, it may
have in the positions described by the parties. It is urged that
conviction is only based on the part of counsel; that the parties
testified positively that the acts were committed, and that whether
or not her description of the position as used by the parties, is
entirely accurate and sufficiently clear to present a complete and
comprehensive picture, it certainly cannot be said as a matter of
fact that the performance of the sexual acts was impossible, nor was
this court so held as a matter of law. And it is urged that counsel's
guesses and conjectures must give way before the positive testimony
of the parties. As also suggested, it has been repeatedly held in
this state that in custody proceedings, it is immaterial on what
particular side the acts of intercourse took place, or on what date
the prosecution became pregnant, the material question to be determined
being whether or not the defendant is the father of the child. (People
v. [illegible], 100 Ill. App. 2d). Of course, in a custody proceeding
it is immaterial upon the state to prove its case by a preponderance of
the evidence and the parties are the burden of establishing the
paternity of the child. However, when the facts in this case it is
apparent that there is substantial evidence upon which the jury could

base their verdict finding that the defendant was the father of the child.

It is further contended that improper argument of counsel for the State influenced the verdict of the jury. Attention is called to the following argument:

"What this girl went through is enough, but this little child - what would it be without a father? And its lot will not be any too rosy even if you find the defendant guilty and this defendant pays \$1100.00, and is given nine years in which to pay it."

This statement was objected to and the court commented that "such remarks are in error", and sustained the defendant's objection.

Objection is also made to the following argument:

"Mr. Brown: Ladies and Gentlemen, I just want to ask would you, or you^s, or you, or would Virginia Bondy come into this courtroom and go through what she had had to go through for a measly 1100.00, which really does her no good."

Objection was made to this, but court told counsel to proceed. Upon this question we have considered the entire argument complained of, including the quoted excerpts and are of the opinion that there was no reversible error in the state's argument. As the first quoted argument, objection was made and sustained by the court.

The State calls attention that the report of proceedings does not contain the proper certificate of the trial judge and is fatally defective, and urges that such defect precludes this court from reversing the judgment. The purported certificate of the trial judge to the report of proceedings is as follows:

"Forasmuch as the matters and things hereinabove set forth do not fully appear of record, the defendant enters this, his report of proceedings in said cause and prays that the same may be signed, and sealed by the Judge of said Court pursuant to the statute in such case made and provided which is accordingly done this 29th day of October, A. D. 1941.

(Signed) James M. Corcoran (Seal)
Judge."

While it is necessary that the court certify that the record contains all of the evidence heard by the jury, still having considered the facts as they are in this record, we have reached the conclusion that

case their verdict stands the defendant was the winner of the suit.

It is further contended that the court's decision on counsel

for the state influenced the verdict of the jury. Objection is raised

to the following argument:

"Now this time when there is shown, but this little while -
what would it be without a trial? And the fact will not be any too
very even if you find the defendant guilty and this defendant says
\$100.00, and is given five years in which to pay it."

This statement was objected to and the court commented that "such

remarks are in error," and sustained the defendant's objection.

Objection is also made to the following argument:

"Mr. Brown: Ladies and gentlemen, I just want to ask you
you, or you, or you, or would Virginia stand late this courtroom
and go through what she had to go through for a year? \$100.00,
which really does her no good."

Objection was made to this, but court told counsel to proceed. Upon

this question we have considered the entire argument contained in

including the quoted excerpts and one of the opinions that there was

no reversible error in the state's argument. As the first witness

argument, objection was made and sustained at the court.

The state calls attention that the witness is proceeding with

not contain the proper certificate of the trial judge and is therefore

defective, and urges that such defect precludes this court from reviewing

the judgment. The purported certificate of the trial judge to the

report of proceedings is as follows:

"Whereas on the date and things hereinabove set forth
to not fully appear of record, the defendant answers this, his report
of proceedings in said case and moves that the same may be allowed,
and moved by the state to call court records in the state in
such case made and verified which is substantially true that this day
of October, 1911.
(Signed) James A. Johnston (State)
Judge."

While it is necessary that the court certify that the record contains

all of the evidence heard by the jury, still having considered the

facts as they are in this record, we have reached the conclusion that

the verdict and judgment entered were ~~xxxxx~~ proper, and, therefore, we need not consider the sufficiency of the certificate of the trial judge.

Having reached the conclusion that the evidence preponderates in establishing the fact that defendant is the father of the child, and there being no error which would justify a reversal, the judgment will be affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

the verdict and judgment entered were correct, proper, and final, and we must not consider the testimony of the witnesses as being in conflict with the verdict and judgment.

Having viewed the evidence and the testimony of the witnesses, we are satisfied that the verdict and judgment entered are correct, proper, and final, and we must not consider the testimony of the witnesses as being in conflict with the verdict and judgment.

THE COURT THEREUPON

ENTERED THE VERDICT AND JUDGMENT.

41775

ALBERT F. DIEGLEY,

Appellee,

v.

MABEL E. LILLY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

315 I.A. 491²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for \$5,533.76 in plaintiff's favor in an action for the conversion of certain bonds which plaintiff claims are his and were given by him to the defendant, his step-daughter, for safe-keeping and were converted to her own use. The bonds were cashed and the proceeds spent or distributed by defendant prior to the trial. The jury, in addition to the general verdict, found in a special verdict that malice was the gist of the action.

The pleadings presented the issues whether the bonds were plaintiff's and by him given to defendant for safekeeping or whether the bonds were defendant's by virtue of a provision of her mother's will. The jury found that the bonds were the property of the plaintiff. The defendant does not contend precisely that the verdict is against the manifest weight of the evidence, but that plaintiff had not met the burden of proof and failed to make out his case by "some" legal evidence. The elements to be proven in the case were, ownership by the plaintiff of the bonds in question and the conversion of them by the defendant. Deciding whether these elements were proven was the province of the jury, unless upon the evidence we can say as a matter of law, that there was no evidence which tended to prove either one or both of the elements. We shall consider the evidence so far as is necessary to determine whether there was evidence to

8121A-101

112

ALBERT V. HICKLEY

W. V. LILLIE

... the plaintiff presented the same to the court. This is an appeal of a judgment from a judgment of the court in plaintiff's favor in an action for the conversion of goods in bonds which plaintiff claims are his and were given by him to the defendant, his step-daughter, for safe-keeping and were converted to her own use. The bonds were cashed and the proceeds spent on distribution by defendant prior to the trial. The jury, in addition to the general verdict, found in a special verdict that within the five of the action.

The plaintiff presented the same to the court. This is an appeal of a judgment from a judgment of the court in plaintiff's favor in an action for the conversion of goods in bonds which plaintiff claims are his and were given by him to the defendant, his step-daughter, for safe-keeping and were converted to her own use. The bonds were cashed and the proceeds spent on distribution by defendant prior to the trial. The jury, in addition to the general verdict, found in a special verdict that within the five of the action.

The plaintiff presented the same to the court. This is an appeal of a judgment from a judgment of the court in plaintiff's favor in an action for the conversion of goods in bonds which plaintiff claims are his and were given by him to the defendant, his step-daughter, for safe-keeping and were converted to her own use. The bonds were cashed and the proceeds spent on distribution by defendant prior to the trial. The jury, in addition to the general verdict, found in a special verdict that within the five of the action.

prove plaintiff's case and whether the verdict was against the manifest weight of the evidence.

Plaintiff at the time of the trial was past 81 years old; had married Luella Diegley, defendant's mother, on January 11, 1911; and had lived with her as husband and wife until her death on October 10, 1937. There was evidence of his financial condition at the time of the marriage. We are concerned only with ownership of the bonds and how they were acquired. Suffice to say that the evidence shows plaintiff had ample means when married and the proof showed that he owned certain Liberty bonds prior to the transaction affecting the bonds, subject of this suit.

The bonds in question were Home Owners Loan Corporation bonds which had been received in exchange for a \$5,000.00 mortgage, theretofore purchased by plaintiff, with the Liberty bonds, from the Mutual Securities Company of Chicago. The mortgage and the checks thereunder were issued to "Luella or Albert F. Diegley" and the authority for delivery of the Home Owners Loan Corporation bonds was in the name of "Luella and Albert F. Diegley". The evidence is that plaintiff and decedent had jointly executed deeds to plaintiff's property, merely to make disposition possible; and that the authority for the Home Owners Loan Corporation bonds was in the name of both, because on the day they were received, plaintiff drove decedent to the Corporation's office and, unable to find parking space for his car, he directed the decedent to go alone and execute in his name the necessary papers. The evidence also shows that decedent signed both her name and plaintiff's to those papers. There was, obviously, evidence which tended to prove that plaintiff owned the bonds and, accordingly, the question of ownership was for the jury.

The defendant claims the bonds were hers by virtue of the provision in her mother's will, which gave to defendant any bonds of

...and whether the verdict was against the
...weight of the evidence.
...at the time of the trial was that of a
...had married Amelia Blakeley, defendant's mother, on January 12, 1911;
...and had lived with her as husband and wife until her death on
...October 10, 1917. There was evidence of his financial condition at
...the time of the marriage. It was connected with the condition of
...the bank and that they were connected. ...to say that the evidence
...shows plaintiff had some means when married and the great amount that
...he owned certain Liberty Bonds prior to the execution of the
...the bonds, subject of this suit.
...The bonds in question were Bond Certificate Corporation bonds
...which had been received in exchange for a \$5,000.00 mortgage, there-
...before purchased by plaintiff, and the Liberty bonds, and the
...actual certificate of ownership of the bonds, and the same
...thereunder were issued to "Amelia or Albert E. Blakeley" and the
...authority for delivery of the Bond Certificate Corporation bonds
...was in the name of "Amelia and Albert E. Blakeley". The evidence is
...that plaintiff and defendant had jointly executed checks to plaintiff's
...credit, namely to make disbursement payable; and that the mortgage
...for the same amount as the Liberty bonds was in the name of both,
...because on the day they were received, plaintiff gave defendant the
...the Corporation's certificate, namely to find further about the fact,
...he directed the defendant to go down and remain in his name the
...necessity of it. The defendant also shows that defendant signed both
...her name and plaintiff's to those checks. There was, obviously,
...evidence which tended to prove that plaintiff owned the bonds and,
...consequently, the question of ownership was for the jury.
...The defendant claims the bonds were given by virtue of the
...provision in her mother's will, which gave to defendant and her

which her mother was possessed. After the bonds were obtained from the Home Owners Loan Corporation, they were placed in the joint safety box of decedent and plaintiff. The morning following his wife's death, plaintiff accompanied by defendant went to the bank wherein he went to the deposit box and withdrew the bonds in question, as well as certain securities owned by the decedent. He showed defendant the securities and then took them to his home, where he placed them in a tin box in the basement. Several weeks later defendant and one of her daughters went to the plaintiff and obtained the bonds from him and placed them in a safety deposit box. In February an installment of interest was due on the bonds and defendant called for the plaintiff and suggested cashing the interest coupons. They went together to the bank where defendant alone cashed the coupons and gave one-half of the proceeds to the plaintiff. There is conflict in the evidence as to whether the plaintiff told the defendant, at the time he withdrew the bonds, that they were hers; whether he gave them to her to be held for him, or in payment of her legacy under her mother's will; and whether plaintiff demanded the bonds from the defendant on the day the interest was collected. The defendant had read her mother's will the night before the bonds were withdrawn from the box and knew that plaintiff had placed them in his tin box in the basement of his home. There is no explanation why defendant permitted plaintiff to keep the bonds at all, if plaintiff told her at the time of the withdrawal they were hers and if she thought they were hers under the will which she had already seen. It is difficult to understand why she called for plaintiff in order to have the interest coupons cashed, if she believed or had been told by plaintiff the bonds were hers. The jury apparently believed plaintiff's story, that, on the way to the bank to get the interest, the defendant stopped and talked to her husband, maker of a note in the sum of \$5,000.00 owned by plaintiff; that defendant

High her report was prepared. After the same were obtained from
a few persons from the station, they were taken in the joint
every box of the station and the station. The station was in the
length, Plaintiff accompanied by defendant went to the station where he
went to the station box and witness the bonds in question, as well
as certain securities were taken to his home, where he found them
the securities and then took them to his home, where he found them
in a tin box in the basement. Several weeks later defendant and one
of her daughters went to the Plaintiff and obtained the bonds from
him and placed them in a safety deposit box. In February an installment
of interest was due on the bonds and defendant called for the Plaintiff
and suggested cashing the interest coupons. They went together to
the bank where defendant alone cashed the coupons and gave one-half
of the proceeds to the Plaintiff. There is conflict in the evidence
as to whether the Plaintiff told the defendant, at the time of the
the bonds, that they were hers; whether he gave them to her to be
held for him, or in payment of her journey under her mother's will;
and whether Plaintiff demanded the bonds from the defendant on the day
the interest was collected. The defendant had seen her mother's will
the night before the bonds were withdrawn from the box and knew that
Plaintiff had placed them in his tin box in the basement of his home.
There is no explanation why defendant permitted Plaintiff to keep the
bonds at all. Plaintiff said that at the time of the withdrawal they
were hers and it was thought they were hers under the will when she
had already seen. It is difficult to understand why she called for
Plaintiff to have the interest coupons cashed, if she believed
or had been told by Plaintiff the bonds were hers. The jury and the
believed Plaintiff's story, and, on the way to the bank to get the
interest, she found no money and refused to pay money, and of
a note in the box of \$2,000.00 which was Plaintiff's; that defendant

thereupon demanded the note in exchange for the bonds and when her demand was refused she converted the bonds.

The defendant contends that the bonds passed under her mother's will. She had read the will the night her mother died, and the evening of her mother's funeral plaintiff read the will in the presence of defendant, her daughter and other relations. All the witnesses seem to agree that after reading the will, plaintiff expressed displeasure because the will failed to provide for the defendant; that he told her there were no bonds of which her mother was possessed which defendant could take under the will; and that he told her he would take care of her himself. There is testimony of defendant's two daughters and one son-in-law that, preceding the reading of the will, plaintiff told them that decedent had left \$5,000.00 in Government bonds for defendant, but that he did not want that fact mentioned at the reading of the will. That testimony is difficult to reconcile with defendant's on this phase of the case. Defendant was not present at the conversation testified to by the three witnesses mentioned, still, at the reading of the will, she made no objection to plaintiff's comment that there were no bonds, even though she says he told her/^{previously} when he withdrew the bonds that they were hers. Other defense witnesses testified that plaintiff had said he was going to turn over the bonds to defendant because he did not want her to be left out of the will. Following the reading of the will, plaintiff employed as attorney for the estate a man recommended by the defendant. This attorney prepared the inventory, which did not list the bonds, and defendant took no action to amend the inventory, made no claim in the Probate court for the bonds, and in her original answer did not contend that the bonds were hers under the will. In an amended answer filed several months later, however, she first made that contention.

made that connection.

an amended answer filed several months later, however, the facts

never all not occurred that the bonds were made under the will. In

made no claim in his income tax for the bonds, and in his original

list the bonds, and defendant took no action to cancel the inventory,

the defendant. This attorney prepared the inventory, which is not

plaintiff employed as attorney for the estate is not recommended by

her to be left out of the will. Following the reading of the will,

was going to turn over the bonds to defendant because he did not want

here. Other defense witnesses testified that plaintiff had said to

though she says he said that he did not want the bonds that they were

no objection to plaintiff's account that there were no bonds, two

three witnesses mentioned, will, at the reading of the will, the same

Defendant was not present at the conversation testified to by the

difficult to reconcile with defendant's on this case of the same.

that fact mentioned at the reading of the will. This testimony is

\$5,000 in government bonds for defendant, but that he did not want

reading of the will, plaintiff told that that defendant had left

defendant's two daughters and one son-in-law that, preceding the

told her he would take care of her himself. There is testimony of

was possessed which defendant could not under the will; and that he

defendant; that he told her there were no bonds at which her mother

expressed displeasure because the will failed to provide for the

witnesses seem to agree that after reading the will, plaintiff

presence of defendant, her daughter and other relatives. All the

the evening of her mother's funeral, plaintiff read the will in the

mother's will. She had read the will the night her mother died, and

The defendant contends that the bonds passed under the

was refused she converted the bonds.

defendant demanded the bonds in exchange for the bonds and when the

Defendant says plaintiff did not meet the burden of proof and that the preponderance was greatly against plaintiff, "there being only his word against several witnesses." The numbers of witnesses are unimportant considered alone. The jury heard the evidence, saw the various witnesses and we believe correctly decided the questions of fact in favor of plaintiff.

Defendant further contends that plaintiff was erroneously permitted to testify that his wife had nothing except \$200.00 when he married her. The record discloses no such testimony, but an affidavit filed early in the proceedings by plaintiff contained such a statement. It is also contended by defendant that the court erred in permitting the plaintiff to testify to the various transactions involving his investments before his wife's death. This claim is based on section 2 of the Evidence Act and defendant's theory is that she defended as a legatee and plaintiff an adverse party to her was incompetent under section 2. Plaintiff could recover only if defendant was not the legatee and the defendant is liable, if at all, only as an individual. Corney v. Corney, 257 Ill. App. 13. Plaintiff did not sue her as, and does not concede that she is, a legatee. Defendant cannot become a legatee of the bonds under her mother's will by so designating herself. She might have become such a legatee by appearing in the Probate court proceedings and there have had her right to the bonds determined. She failed to do so and it is apparent from the testimony that she formed no belief that the bonds were hers by virtue of the will until several months after filing her original pleadings long after getting the bonds and disposing of their proceeds. To permit her to invoke section 2 in bar of plaintiff's testimony as to how the bonds came into his ownership, would be to assume an issue in the case in her favor. In the Corney case above cited, Corney sued his brother to recover money which the latter claimed to hold as administrator. Corney's testimony regarding the transactions with

Defendant says Plaintiff did not read the report of Grand Jury and that the proceedings were merely a matter of "housekeeping" and that his name was not on the list of witnesses. The jury heard the evidence, saw the various witnesses and by their verdict found the question of fact in favor of Plaintiff.

Defendant further contends that Plaintiff was improperly permitted to testify that his wife had dated several men, but he carried away. The record shows to each testimony, and in Plaintiff filed early in the proceedings by Plaintiff's counsel was a statement. It is also contended by Defendant that the court erred in admitting the Plaintiff's testimony to the various statements involving his statements before his wife's death. This claim is based on section 2 of the Evidence Law and defendant's theory is that the Plaintiff as a layman and Plaintiff in answer says to that the incompetent under section 2, Plaintiff could answer only if Defendant was not the father and the defendant is liable. It is all only an individual. Gray v. Gray, 127 Ill. App. 2d 111. Plaintiff did not see her on, and does not possess that she is a layman.

Defendant cannot remove a factor of the bonds under her action will be as defendant himself. The right have become such a factor by appearing in the Probate Court proceedings and there have been no right to the bonds returned. The right is to see it is defendant's right and testimony that was taken no matter that the bonds were taken by virtue of the will removed money after filing her original statement from after parties the bonds and disposing of their property. It is possible that to receive section 2 is not at Plaintiff's testimony as to that the bonds were taken his testimony, would be to remove it from in the case in fact. In the Gray case, Gray v. Gray, would his brother in law have money which the father claimed to have as administrator. Gray's testimony regarding the inheritance of the

decedent were objected to by his brother, the defendant. The court held that Corney was competent to testify because he had not sued his brother as administrator, and that the brother was not defending as administrator.

The next point raised is that plaintiff accepted benefits under the will in the form of a life estate in property, and that he, therefore, ratified every other part of the will, including the provision with reference to the bonds. It is not necessary to consider that or the related point as to when a will speaks, because the jury has found and we believe rightfully so, that the bonds in question belonged to the plaintiff and did not pass to the defendant under the will.

The remaining point is that certain exhibits were erroneously permitted to go to the jury without having been introduced and received in evidence. The record shows that trial counsel for defendant offered no objection to the admission of the exhibits when they were offered in evidence and while the court did not expressly rule that they were received in evidence, it is evident from the record that the court considered the exhibits in evidence and we believe they were properly before the jury and in the record before us.

Error is vaguely attributed to the giving of an instruction on behalf of the plaintiff. While no argument is made to support the alleged error we have concluded in view of the evidence, that the jury was fairly instructed and that the judgment should be affirmed.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.

decedent were objected to by his father, the defendant. The court held that the jury was competent to decide whether or not the defendant was an administrator, and that the plaintiff was not entitled to a verdict.

The next point raised is that the plaintiff's evidence is inadmissible under the will in the form of a life estate in property, and that he, therefore, relied every other part of the will, including the provision with reference to the bonds. It is not necessary to consider that or the raised point as to when a will is made, because the jury has found and we relate rightly so, that the bonds in question belonged to the plaintiff and did not pass to the defendant under the will.

The remaining point is that certain exhibits were erroneously permitted to go to the jury without having been introduced and received in evidence. The record shows that trial counsel for defendant offered no objection to the admission of the exhibits when they were offered in evidence and while the court did not expressly rule that they were received in evidence, it is evident from the record that the court considered the exhibits in evidence and we believe they were properly before the jury and in the record before us. Error is usually attributed to the giving of an instruction on behalf of the plaintiff. While no argument is made to support the alleged error we have concluded in view of our findings, that the jury was fairly instructed and that the judgment should be affirmed.

For the reasons herein given the judgment of the circuit court is affirmed.

RECORDED IN INDEX.

COURT, J. J. W. BROWN, J. W. BROWN.

41751

JOHN J. CROWE, doing business as
JOHN J. CROWE AND COMPANY,

Appellee,

v.

ELSINOR APARTMENTS, INC., a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

PER CURIAM.

315 I.A. 1921

This is an action for a real estate broker's commission, tried by the court without a jury. There was a judgment for plaintiff for \$2,025.00. Defendant has appealed.

In February 1940, Miller, plaintiff's real estate salesman, obtained from Harold C. Joy, a real estate broker, a list of properties for sale which included the Elsinor Building owned by the defendant and located at the southeast corner of Diversey and Laverne avenue in Chicago. The list consisted of ten pages, setting out 131 properties owned by various corporations. On each list was a provision that only written offers of purchase would be entertained by the owner and only when accompanied by a deposit of 10 per cent of the sale price.

John Marhoefer and his wife about the first of July, 1940, contracted for the purchase of the Elsinor Building and in September, 1940, accepted delivery of the deed and paid the real estate broker's commission to one Stearn. This suit claims that Miller, and not Stearn, was the procuring cause of the sale and that plaintiff is entitled to the commission.

The evidence indicates that several hundred lists such as Miller had received were sent or delivered by Joy to other real estate brokers and that plaintiff's claim that he had a contract with the defendant for the sale of its property is not tenable,

WILLIAM J. HENRY, alias HENRY, alias
WILLIAM J. HENRY, alias HENRY,

Age 31/2

V.

ELIZABETH HENRY, alias HENRY,
WILLIAM J. HENRY, alias HENRY,

WILLIAM J. HENRY, alias HENRY,

THE EVIDENCE

This is an action for a writ of habeas corpus, return
granted by the court without a jury. There was a judgment for the
city for \$100.00. Defendant has moved.

In February 1900, William J. Henry, alias HENRY, alias HENRY,
man, obtained from Harold E. Joy, a real estate broker, a list of
properties for sale which included the interest owned by
the defendant and located at the southeast corner of Jackson and
Lafayette Avenue in Chicago. The list consisted of two items,
beginning with 171 property owned by William J. Henry, alias HENRY,
list was a certified copy of the original record of the Chicago
entireties of the property and only that mentioned as a property
of 10 per cent of the whole estate.

John W. Henry and his wife about the time of July, 1900,
contracted for the purchase of the interest in the property owned by
1900, accepted delivery of the deed and sold the real estate to
commission to one Henry. This was done by Henry, but not
written, was the original copy of the deed and was delivered to
entitled to the commission.

The witness testimony that Henry received from
an office had received from Henry and delivered to him in 1900
estate interest and that Henry's wife had not a mortgage
with the instrument for the sale of the property in her name.

for it is evident that his position was the same as the many other brokers, that is, he had an opportunity to contract, which was realizable if he procured the buyer.

The plaintiff advertised the property for sale and Marhoefer responded by a telephone call and was put in contact with Miller with whom he had had a prior dealing. Miller showed Marhoefer and his wife several of the apartments and the boiler room, discussed possible purchase price with them and brought Marhoefer to Joy's office for a discussion of a deal. Joy insisted that a sale of the property required a consideration of \$42,500.00, but that a sum \$500.00 less might be acceptable. There is a dispute as to whether Marhoefer and Miller offered \$37,000.00 or \$39,000.00. The dispute is unimportant for the price discussed was not accepted. There were later conversations by Miller with Joy and with Marhoefer, seeking to compromise the sale price. The record indicates that Miller told Marhoefer, Joy would not accept less than \$41,500.00, and Marhoefer said he would not pay that price. In April, Marhoefer made a deposit on the purchase of a different building and Miller interested Dr. Hoffman in the purchase of the Elsinor property, apparently at a higher figure than interested Marhoefer. Miller subsequently talked to Joy about Dr. Hoffman's interest and Joy would not accept an offer of \$41,000.00. Joy says that Miller told him the Marhoefer deal had "flopped" because of water in the boiler room. Miller, while not definite on the point, indicates that while he may have told Joy a deal had slowed down because of water in the boiler room, he was talking of the Hoffman deal and not the Marhoefer deal.

After the conference at Joy's office Marhoefer turned to Stearn, his personal real estate broker, who commenced a deal with one Palesch for property on Thome street and a deposit was made by Marhoefer. This deal did not materialize and Palesch then brought

for it is evident that his position was the same as the one of the
 business, that is, he had an opportunity to observe, and was
 responsible if he procured the paper.

The plaintiff advertised his property for sale and

thereafter responded by a telephone call and was not in contact
 with Miller with whom he had had a prior dealing. Miller moved
 Westover and his wife several of the apartments and the latter

room, discussed possible purchases since the time the property

Westover to say's office for a discussion of a deal. They discussed

that a sale of the property would be a considerable sum of money, and

but that a sum of \$100,000 less might be necessary. There is a dispute

as to whether Westover and Miller agreed upon the sale of the property.

The dispute is unimportant for the case discussed was not resolved.

There were later conversations on Miller with the other parties, and

Miller to complete the sale of the property. The property was sold

Miller and Westover, but would not exceed less than \$100,000.

and Westover said he would not get the property. In fact, Westover

made a deposit on the purchase of a different building and Miller

interested in the purchase of the other property.

eventually at a night time when Westover's property was sold.

eventually failed to get about \$100,000's interest and for

would not accept an offer of \$100,000. For some time Miller said

him the Westover deal had "disappeared" because of water in the building

room. Miller, while not active in the deal, indicated that Miller

he may have told for a deal and stated that he was not in the

business now, he was satisfied of the business deal and was the

Westover deal.

After the business deal, Miller's office continued to be

Miller, his personal staff were present, who continued to deal with

one allowed for property on the deal and a deal was made of

Westover. This deal was not successful and the deal was not

to Marhoefer's attention again, the defendant's property.

There is a contention of the plaintiff, but not clear from the evidence, that Marhoefer had sufficient means to have made the deal for the Thome street property without abandoning the idea of the purchase of defendant's property; neither is the point important in our view of other circumstances. There is also a contention that Joy was an agent of the defendant and that, by his discussions with Miller in this matter, Joy bound the defendant. Evidence was introduced to show the close relationship between Joy and Von Borries, an officer of the building corporation. There is no contradiction of the testimony that to consummate a deal for any of the properties listed, Joy was to negotiate on his own account for a figure which he deemed acceptable to the corporation to be submitted, together with a written offer and the deposit check, to the corporation for action by its Board of Directors. The evidence shows he was engaged as a broker to stimulate sales and that he paid for his space in the office suite with Von Borries. We cannot see that Joy's relation to the defendant affects plaintiff's claim. If Miller was the procuring cause of the sale, plaintiff's contract with defendant was consummated when the written offer was accepted, and if he was not the procuring cause there was no contract. The main question, therefore, to be decided, is whether in consideration of the circumstances of the relationship and efforts of Miller and Stearn, respectively, with Marhoefer, which one procured Marhoefer as the buyer. To determine this question, we shall discuss the law and the efforts of Miller and Stearn.

To sustain the judgment plaintiff relies upon Buhl v. Noe, 51 Ill. App. 622, where the court announced the rule that where an owner contracts with a broker to sell property upon a commission,

to witness the defendant's property.
There is a contradiction in the testimony, but not in the
fact the witness, that defendant had possession of the house
the deal for the house at that property which was the house
of the purchase of defendant's property; witness is the only
important in the view of other circumstances. There is also a
contradiction that Joy was an agent of the defendant and that, by the
disclosure of the witness in this matter, Joy owned the defendant.
Witness was introduced to show the close relationship between Joy
and Von Corbin, an officer of the building commission. There is
no contradiction of the testimony that it was a house - and the
any of the property listed, Joy was to negotiate on his own account
for a list which he had received from the commission in the
submitted, together with a written offer and the house itself, he
the corporation for action by the board of directors. The witness
states he was engaged as a broker in relation to the house and that he
paid for his house in the office with his own money. A witness
states that Joy's relation to the defendant's property is that of a
It states that the property was in the name of the wife, defendant's daughter,
with defendant was connected with the witness state was connected,
and if he was not the property was a house was no mortgage. The
main question, therefore, to be asked, is whether in connection
of the circumstances of the relationship and efforts of witness and
there, respectively, with defendant, which was connected with
as the party, to determine this question, we shall discuss the
and the efforts of witness and defendant.
To sustain the judgment of the court in this case, it is
in III. App. 2d, where the court announced the rule that when an
other contracts with a party in good faith, and a defendant,

where there is no price fixed and the broker produces a buyer with whom the owner negotiates to a sale, the broker is entitled to a commission. We agree with that rule and the holdings in Englestein v. Bartholomae, et al., 188 Ill. App. 562, and Marton v. Rogers, 84 Ill. App. 49, also cited by plaintiff. These cases are not applicable because in them there were contracts of brokerage and unbroken negotiations from the original meeting arranged by the broker to the consummation of the sale and the circumstances showed a design of the respective parties to cheat the brokers. In the instant case Marhoefer, after Miller brought him to the negotiating stage, negotiated for an entirely different property with an entirely different broker and Miller had pursued another purchaser. We believe the plaintiff may have interested Marhoefer in the first instance, but we also believe that that interest waned and plaintiff's efforts did not effect or bring about the sale and only the persons whose efforts did so, is entitled to the commission. White v. Sellmyer, 157 Ill. App. 435. To confirm our view we compare the efforts of the brokers. In addition to showing the Marhoefers the building, plaintiff had conferences and conversations with Marhoefer and Joy, furnished a statement of income and expenses to Marhoefer, and told him he could get commitment for a \$28,000.00 mortgage on the property if the deal was made. It seems that nothing further was done by him. Other brokers had submitted the property to Marhoefer before Miller did and the latter had submitted it to other prospects. He did not submit a written offer accompanied by a ten per cent deposit either on behalf of Marhoefer or anyone else. At Marhoefer's request Stearn appraised the property; arranged for a sale of Marhoefer's three flat building, the mortgage loan on

where there is no other land and the broken stream is a way to
 show the owner negotiable in a sale, the stream is entitled to a
 consideration. The case with this title and the holding in
Eastman v. Eastman, 211, 212, 213, 214, 215, and 216
 V. 100, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

the property to be purchased, and a personal loan from the Prairie State Bank; all of which enabled Marhoefer with \$5,000.00 to \$6,000.00 in the bank to raise the \$40,500.00 necessary for the purchase. He also handled the details of the written offer to purchase. The finding of the Municipal Court that Miller was the procuring cause of the sale is clearly against the weight of the evidence. Glatt v. Anderson, 257 Ill. App. 630.

The defendant complains that Joy resisted his offers of a purchase below \$41,500.00 and later sold through Stearn at \$40,500.00. This complaint suggests only that Stearn succeeded in compromising, where Miller had failed. Further, he says Joy insisted on \$41,500.00 when Miller had interested Hoffman at \$40,000.00. This does not help plaintiff's case against defendant based on the Marhoefer deal.

The judgment of the Municipal Court is reversed and judgment is entered here for defendant's costs.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR DEFENDANT'S COSTS.

BURKE, P.J. AND HEBEL, J. CONCUR.

the property to be sold, and a receipt from the
State Bank; all of which were filed in the
\$1,000.00 in the bank to raise the \$1,000.00 necessary for the
purchase. He also furnished the details of the original offer to
purchase. The finding of the court was that the plaintiff was
the proper party to the sale in equity against the estate
of the deceased. Walt v. Walcott, 117 Ill. App. 2d, 200.

The defendant complains that the plaintiff was not
a purchaser for value. \$1,000.00 was paid to the estate at
\$40,000.00. This complaint requires that the estate be shown
in connection, where the plaintiff had failed. In fact, he was
indicted on \$1,000.00 when the plaintiff had introduced evidence
\$40,000.00. This does not help the plaintiff's case in that connection
based on the defendant's sale.

The judgment of the circuit court is reversed and
judgment is entered here for defendant's wife.

WILLIAM H. HARRIS, JR., JUDGE
THE HONORABLE COURT

WILLIAM H. HARRIS, JR., JUDGE

42038

WALTER KUDELA,

Appellee,

v.

NORTHWESTERN SECURITIES COMPANY, a
corporation, and NORTHWESTERN TRUST AND
SAVINGS BANK, a corporation, as Trustees,
and "UNKNOWN OWNERS",

Appellees,

GUSTAVE SPITZER,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

315 I.A. 192⁺

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

The defendant, John N. Budzban, Successor in trust to the Northwestern Trust and Savings Bank, as trustee under Trust No. 850, filed his Eleventh Current Account and Report on June 24, 1941, to which objections were filed by the defendant Gustave Spitzer, one of the beneficiaries under said Trust, which account and said objections were set for hearing on July 15, 1941. On July 16, 1941, two orders were entered by the Court, the first, overruling the said objections of the defendant, Gustave Spitzer, and the second, allowing fees of \$3,330.75 to John N. Budzban, said Successor-trustee, and the sum of \$3,330.75 to Max Krauss, attorney for said Successor-trustee, which are the orders appealed from.

One of the orders of July 16, 1941, in the recital part, refers to "the petition of John N. Budzban successor-trustee for leave to file his Eleventh Current Account and Report", and again, "the court having read the petition", etc. There is no petition thus referred to in this Order unless it is the Eleventh Current Account and Report itself, which, although in form a petition, is entitled "Eleventh Current Account and Report" wherein the successor in trust prays that he be given leave to file instanter his Eleventh Current Account and Report, etc. No separate or other Petition was filed by said Trustee or considered by the Court in connection with said Account and Report and allowance of fees.

RECEIVED

The appellant argues that the trustee, because of the conflict of interest he represents, is not entitled to any compensation for himself or his attorney. It appears from the argument that Walter Kudela, Complainant, on September 3, 1931, filed his Bill and thereafter his Supplemental Bill on February 11, 1932, against the defendant, the North-Western Securities Company and others, which alleged inter alia, that on January 1, 1928, said North-Western Securities Company issued its certain "first mortgage lien collateral trust 6% gold notes, known as Series 'E' of 1928", aggregating \$300,000.00, which were the obligation of the North-Western Securities Company, at the same time created a trust known as Trust No. 850, pursuant to which there were deposited with North-Western Trust & Savings Bank, as Trustee, certain real estate mortgages on lands in Chicago and vicinity, having a face value of \$300,000.00; that Complainant Kudela was the owner of two notes of said notes aggregating \$1,500.00; that the said Securities Company was a subsidiary of the said North-Western Trust & Savings Bank and that, in June, 1931, said Bank had ceased business and closed its doors.

The defendant John N. Budzban submitted himself to the jurisdiction of the court in the instant case. On June 28, 1940, the defendant, Gustave Spitzer, sued herein as "Unknown Owners" was given leave to enter his appearance and file his answer and counterclaim. A decree was subsequently entered with consent of all parties dismissing Spitzer's counterclaim, and continuing the successor-trustee's administration of the trust, "with the view of liquidation, if possible, within two years" from entry of the decree. The court, however, reserved jurisdiction of all matters relating to the liquidation and accounting of the assets of the trust estate.

The defendant John N. Budzban is also Receiver of the North-Western Securities Company, the maker, issuer, and obligor of the gold notes, series "E" 1928, secured by the trust indenture. He was appointed Receiver in the case of Nering v. North-Western Securities Company, in the Circuit Court of Cook County, B-222477, on June 26,

The defendant argues that the plaintiff, because of his negligence of interest in the property, is not entitled to any compensation for himself or his attorney. It appears from the evidence that the plaintiff, on September 2, 1921, filed a bill in equity after his "voluntary" bill on February 11, 1921, and that the defendant, the North-eastern Securities Company and others, which alleged that the plaintiff, on January 1, 1922, sold North-eastern Securities Company issued the certain "first mortgage lien certificate" to the plaintiff known as Series "A" of 1922, aggregating \$100,000.00, which were the obligation of the North-eastern Securities Company, at the same time created a trust known as Trust No. 820, pursuant to which there were deposited with North-eastern Trust & Savings Bank, in Toledo, Ohio, real estate mortgages on lands in Chicago and vicinity, having a total value of \$300,000.00; that defendant issued on the same day notes of said notes aggregating \$1,000,000; that the said Securities Company was a subsidiary of the said North-eastern Trust & Savings Bank and that, in June, 1921, said bank had received certain and others its assets.

The defendant John W. Anderson admitted himself to the jurisdiction of the court in the instant case. On June 10, 1920, the defendant, but not the plaintiff, was named as "defendant" and given leave to enter his answer and file his answer and counter-claim. A decree was subsequently entered with consent of all parties dissolving the partnership, and continuing the partnership, trustee's administration of the trust, with the view of liquidation, if possible, within two years' from entry of the decree. The court, however, retained jurisdiction of all matters relating to the liquidation and accounting of the assets of the trust estate.

The defendant John W. Anderson is also manager of the North-eastern Securities Company, the bank, issued, and holder of the Gold notes, Series "A" of 1922, covered by the trust instrument. He was appointed receiver in the case of North-eastern Securities Company, in the Circuit Court of Cook County, Illinois, on June 10,

1931, was still acting as such receiver on March 1, 1941, the date of the entry of the decree in the above entitled cause, and was such receiver at the time of the filing of Notice of Appeal herein.

It is urged that the defendant, John N. Budzban, as Receiver of the North-Western Securities Company, is entitled to whatever equity there may be in the assets in trust No. 850 over and above full satisfaction and discharge of the outstanding notes of said series "E" of 1928; and that as such, his interest as the owner of the equity must conflict with his duties as successor in trust herein. The first point made by appellant as ground for reversal is that appellee and his counsel are not entitled to compensation by reason of an alleged conflict of interest of appellee. It is claimed that his position as successor-trustee and as Receiver of the North-Western Securities Company constitutes a conflict of interest and that therefore appellee and his counsel are not entitled to compensation for services rendered. Appellee's answer is that: (a) An examination of the objections filed by appellant to the Eleventh Current Account and Report does not raise this issue and it is advanced for the first time in this court. Under point 3 of appellee's brief cases are cited to support the proposition that an objection made for the first time in the appellate tribunal cannot be considered and it is urged that unless first raised in the trial court, it is not subject to review by the appellate court; (b) That the final decree was entered in this cause on March 1, 1941, in which the appointment of appellee as successor-trustee was confirmed, his acts as successor-trustee approved, and appellee was directed to continue the administration of the trust; and (c) That the cases cited by counsel for appellant as the basis for his argument in connection with the alleged conflict of interest, are not applicable to the case at bar. The final decree of March 1, 1941 was entered upon the pleadings in the case which included the counter-claim by appellant and a report of a Master in Chancery. The counter-claim of appellant was dismissed for want of equity and an appeal from the decree waived by appellant. Appellant was a party to the proceedings which resulted in said decree

well, was still acting as such receiver on March 1, 1941, and was
of the entry of the decree in the above entitled matter, and was then
receiver at the time of the filing of the petition of the plaintiff.
It is urged that the defendant, John J. Sullivan, as receiver
of the North-Western Securities Company, is entitled to whatever equity
there may be in the assets in trust for the benefit of the plaintiff
and discharge of the outstanding notes of said company. It is
further urged that as such, his interest in the assets of the company must
conflict with his duties as receiver in trust for the plaintiff. The first point
made by defendant is found for reversal in that defendant was not
opposed and was entitled to compensation by reason of an alleged
conflict of interest of defendant. It is claimed that his position as
receiver-trustee and as receiver of the North-Western Securities
Company constitutes a conflict of interest and that defendant was
and his counsel are not entitled to compensation for services rendered,
appellee's answer is that: (a) An examination of the defendant's
filed by appellee to the Seventh Circuit court and record show that
this issue and it is advanced for the first time in this court.
First point 3 of appellee's brief does not raise an issue and
proposition that an objection made for the first time in the appellate
tribunal cannot be considered and it is urged that without proper notice
in the trial court, it is not subject to review by this appellate court;
(b) That the final decree was entered in this matter on March 1, 1941,
in which the appointment of receiver as receiver-trustee was confirmed,
his role as receiver-trustee approved, and appellee was directed to
execute the administration of the trust; and (c) that the record shows
by counsel for appellee as the basis for his argument in connection
with the alleged conflict of interest, was not established in the trial
court. The final decree of March 1, 1941 was entered upon the findings
in the case which included the recommendation by counsel and a report
of a master in chancery. The receiver-trustee was appointed
for want of equity and an appeal from the decree failed by appellee.
Appellant was a party to the proceedings which resulted in said decree

and is bound by the provisions thereof. Appellant had his opportunity to be heard upon the question of conflict of interest, if there was one, because such situation existed at the time of the entry of the decree. The final decree as entered by the court found that appellee was a proper successor - trustee and entitled to continue in the administration of the estate, and it follows as the necessary corollary that the successor-trustee and his counsel are entitled to the compensation provided for by the trust instrument.

It appears from the facts that appellee was appointed Successor-trustee by a majority of the note-holders in accordance with the terms of the trust instrument. These note-holders had the right by a majority vote to designate whomever they pleased as successor-trustee. Appellee was not a self-constituted trustee, and therefore has none of the obligations imposed on self constituted trustees. It appears from the facts as we have recited them that appellant's contentions in this regard are not good, and we are of the opinion from the suggestions made and from the record as we find it that the court did not err in approving the Eleventh Current Report and Account of appellee nor in the allowance of fees that was made by the court in its order.

Appellant further contends that the court erred in disposing of his objections without requiring the trustee and his attorney to prove the value of their services. However, there is no report of proceedings in this record from which this court can determine what took place at the hearing. The order appealed from recites that the court was "fully advised in the premises", and in the absence of a showing by a report of proceedings that the trial court had committed some impropriety, this court must presume in favor of the correctness of the order, and presume that such facts were heard and considered by the court as to justify the entry of the order in question. Upon the question of whether the court heard and disposed of appellant's objections without requiring appellee and his attorney to prove the value of their services, appellant relies on the case of Frudence

and is done by the provision therein. Application was made for a writ of habeas corpus to be heard upon the petition of applicant at a time and place to be named by the court. The writ was granted and the applicant was released from custody.

The final factor as entered by the court found that the
proper successor - trustee had not been appointed in the
of the estate, and it follows as the necessary consequence that
successor-trustee and his counsel are entitled to the compensation
provided for by the last instrument.

It appears from the facts that the trustee was appointed by a majority of the estate in accordance with the terms of the will instrument. The trustee was appointed by a majority vote to administer the estate and to distribute the assets of the estate. The trustee was not a self-named trustee, and the estate has none of the obligations imposed on self-named trustees. It appears from the facts that the trustee was appointed by a majority of the estate in accordance with the terms of the will instrument. The trustee was appointed by a majority vote to administer the estate and to distribute the assets of the estate. The trustee was not a self-named trustee, and the estate has none of the obligations imposed on self-named trustees. It appears from the facts that the trustee was appointed by a majority of the estate in accordance with the terms of the will instrument. The trustee was appointed by a majority vote to administer the estate and to distribute the assets of the estate. The trustee was not a self-named trustee, and the estate has none of the obligations imposed on self-named trustees.

...further comments that the copy given in ...
...in the absence of fact that was made by the court in its
...not at in reviewing the "Lester" current report on record of
the suggestions made and time has passed as we find it hard to come
conclusion in this regard and now, and we are at the same time

Company v. Illinois Women's Athletic Club, 284 Ill. App. 210. It is suggested by appellee that the notice of appeal in this case calls into question only a portion of the order entered on July 16, 1941. This order, besides allowing fees to appellee and his counsel, approved the Eleventh Current Account and Report of appellee, and the action of the court in so approving the Current Account and Report is not called into question. Other matters in the order likewise are not called into question. All that is called into question by this appeal is that part of the order which allows the fees to appellee and his counsel. The appellant having filed no report of ~~report of~~ proceedings and the order appealed from having recited that the court was "fully advised in the premises", we are of the opinion that there is nothing in this record to show an abuse by the court in making such allowance of fees to appellee and his attorney. The allowance of fees to the appellee and his counsel was discretionary with the court, and such allowances should be reversed only for abuse of discretion. Upon consideration of the record before this court, we are obliged to assume that such proceedings were had upon the hearing as justified the allowance of fees. There is nothing in the record to show that the court acted arbitrarily or improperly, or without due inquiry into the services rendered and the value thereof.

Under the circumstances, therefore, and upon the record as presented to this court, we are of the opinion that the order appealed from must be affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

42077

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

PETER B. SCHYMAN and HORACE B. HANNON,

Defendants.

Indictment.

IN THE MATTER OF THE ERROR CORAM NOBIS,
PETITION AND MOTION OF PETER B. SCHYMAN
and HORACE B. HANNON,

ERROR TO

CRIMINAL COURT

COOK COUNTY.

PETER B. SCHYMAN,

Petitioner - Appellant,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent - Appellee.

315 I.A. - 33

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by Peter B. Schyman from an order of the Criminal Court of Cook County dismissing a Petition and Motion of Peter B. Schyman and Horace B. Hannon in the nature of a writ of Error Coram Nobis asking the vacation of a judgment of conviction of the crime of abortion because of alleged errors in fact set out in the Motion and Petition. Since the filing of said Petition, Horace B. Hannon has died, and his death suggested of record.

The facts as they appear are that Doctors Peter B. Schyman and Horace Hannon were indicted in the Criminal Court of Cook County on September 16, 1936 for the crime of abortion upon a woman alleged to be pregnant. On the trial a Dr. Bernard J. Froelich testified for the state that he applied a pregnancy test, known to the medical profession as the Antuitrin-S Skin Test, and from the result of that test gave it as his opinion that the prosecutrix was pregnant. Petitioner contends that the testimony of Dr. Froelich was the only testimony in support of the allegation of pregnancy. Dr. Hawkins testified for the State that after the supposed abortion he found no fetus or sign of placental tissue.

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

PETER A. BRYAN and HORACE A. HANNON,

Defendants.

IN THE MATTER OF THE WILL OF JOHN HANNON,
PETITION AND MOTION OF PETER A. BRYAN
AND HORACE A. HANNON,

PETER A. BRYAN,

Petitioner - Plaintiff,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent - Defendant.

ALL JUSTICE KNOWING THE ALIEN IN THE COURT:

This is an appeal by Peter A. Bryan from an order of

the Criminal Court of Cook County dissolving a will and action of Peter A. Bryan and Horace A. Hannon in the matter of a will of John Hannon asking the vacation of a judgment of conviction of the crime of abortion because of alleged errors in fact and law in the motion and petition. Since the filing of said petition, Horace A. Hannon has died, and his death suggested of record.

The facts as they appear are that before Peter A. Bryan and Horace Hannon were indicted in the Criminal Court of Cook County on September 16, 1928 for the crime of abortion upon a woman alleged to be pregnant. On the trial a Dr. Leonard A. Goodrich testified for the state that he applied a pregnancy test, known as the medical profession as the Antulfin-1 test, and from the result of that test gave it as his opinion that the pregnancy was genuine.

Petitioner contends that the testimony of Dr. Goodrich was the only testimony in support of the allegation of pregnancy. Dr. Goodrich testified for the state that after the woman abortion in 1928, no fetus or sign of placental tissue.

Defendants were found guilty and sentenced upon the verdict of the jury from one to ten years in the penitentiary. Their conviction was reviewed by the Supreme Court on writ of Error and the judgment affirmed on a per curiam opinion rendered at the April 1940 term, and rehearing was denied at the October 1940 term. (People v. Schyman, 374 Ill. 292). The mandate of the Court was stayed from time to time until August 13, 1941, during which time defendants were out on bond. This petition was filed on August 8, 1941, on which day Dr. Horace B. Hannon died. Dr. Peter B. Schyman (appellant here) is now in the penitentiary serving his sentence under this conviction.

Petitioner contends that the Antuitrin-S test supplied the sole proof of pregnancy, and that since the trial scientific tests have shown the Antuitrin-S Skin test to be as high as 72^{per cent} erroneous. Petitioner states that, there having been no issue made as to the accuracy of the Antuitrin-S test on the trial, its scientific accuracy having been assumed, and the conviction having been based upon its assumed accuracy, and it subsequently having been scientifically ascertained and proven that the test is 72^{per cent} erroneous, the question here presented is whether the defendant can under such circumstances be relieved of such a conviction by a motion in the nature of a writ of Error Coram Nobis. It is suggested that the court was led to take judicial cognizance of the supposed fact, that such method of determining pregnancy had been so far scientifically established by test and experience that it could be judicially noticed as a means of supplying proof of pregnancy. Petitioner contends that the error here complained of is one of fact and is such error as is within the purview of section 72 of the Civil Practice Act, ^{Dones Sel. Stats. Ann. 104.072} and within the principle governing relief in such cases, and within the field of error which the motion in the nature of a writ of Error Coram Nobis provision of the Statute was designed to relieve.

Defendants were found guilty and sentenced upon the verdict of the jury from one to ten years in the penitentiary. Their conviction was reviewed by the Supreme Court on writ of error and the judgment affirmed on a per curiam opinion rendered at the April 1940 term, and rehearing was denied at the October 1940 term. (People v. Latham, 374 Ill. 239). The mandate of the Court was issued from time to time until August 11, 1941, during which time defendants were out on bond. This petition was filed on August 5, 1941, on which day Dr. George W. Cannon died. Dr. Lester B. Cobyman (appellant here) is now in the penitentiary serving his sentence under this conviction. Petitioner contends that the Antulfin test qualified the sole proof of pregnancy, and that since the trial testimony had shown the Antulfin test to be as high as 75% accurate, Petitioner states that, there having been no issue made as to the accuracy of the Antulfin test on the trial, its scientific accuracy having been assumed, and the conviction having been based on its assumed accuracy, and it subsequently having been scientifically ascertained and proven that the test is 75% accurate, the question here presented is whether the defendant can under such circumstances be relieved of such a conviction by a motion in the nature of a writ of error coram Vobis. It is suggested that the court was led to such judicial reliance of the supposed fact, that such method of determining pregnancy had been so far scientifically established by fact and experience that it could be judicially noticed as a source of sustaining proof of pregnancy. Petitioner contends that the error here complained of is one of fact and is such error as is within the province of section 12 of the Civil Practice Act and within the province of the court to correct in such cases, and within the field of error which the motion in the nature of a writ of error coram Vobis is designed to relieve.

The petitioner suggests that the motion in the nature of a writ of error coram nobis is proper for relief against a judgment where the court, counsel, litigants and witnesses have mistakenly assumed the existence of a scientific test, upon which proof of some ultimate fact necessarily rests, when later it is shown that such supposed scientific fact is in reality a scientific error.

The State, in reply to petitioner's contentions, suggests that the criminal court conviction did not rest upon opinion evidence alone to establish the fact of pregnancy. The Supreme Court decision, which was made a part of the petition by reference, disclosed acts of sexual intercourse with a named man, followed by a cessation of menses during the three-month period prior to attending the defendant doctor, certain nervous and functional disorders suffered after the cessation of the menses, and bleeding and passing water and large clots of blood vaginally after the removal of a catheter which had been inserted into the victim's womb by way of the cervix. By way of reply, the State suggests that a test allegedly 28% ^{per cent} reliable does not establish an error of fact relievable by error coram nobis in the instant case.

In the case of People v. Bruno, 346 Ill. 449, the claim was made that a defense was not presented due to an error of judgment on the part of accused. The court there said;

"While the motion provided for in section 89 of the Practice Act to correct errors of fact may be availed of by a party who without fault or negligence has been prevented from making a defense, yet the motion is not intended to relieve a party from the consequences of his own negligence."

The petitioner was a doctor of medicine regularly practicing his profession up to the time of trial. Consequently, it should be presumed that as a professional man he kept up with the progress, new developments and new practices in the science of medicine. The petitioner does not justify his negligence either for his failure to keep informed in matters appertaining to his profession or for his failure to present the evidence now desired. The petition in question discloses

The petitioner suggests that the motion in this case is a writ of error coram nobis is proper for relief against a judgment where the court, counsel, litigants and witnesses have mistakenly assumed the existence of a scientific test, when such test is ultimately not necessarily true, when later it is shown that such supposed scientific test is in reality a scientific error.

The state, in reply to petitioner's contention, suggests that the criminal court conviction did not rest upon reliable evidence alone to establish the fact of rape. The Supreme Court decision which was made a part of the petition by reference, disclosed facts of sexual intercourse with a named man, followed by a statement of mensae during the three-month period prior to attending the defendant doctor, certain nervous and functional disorders suffered after the cessation of the mensae, and bleeding and swelling when and later state of blood vaginally after the removal of a catheter which had been inserted into the victim's womb by way of the cervix. In reply, the state suggests that a test allegedly scientific is not establish an error of fact relievable by error coram nobis in the instant case.

In the case of People v. Jones, 448 Ill. 449, the claim

was made that a defense was not presented due to an error of judgment on the part of counsel. The court there said:

"While the motion provided for in section 87 of the Practice Act to correct errors of fact may be availed of by a party who claims that or negligence has been prevented from making a defense, yet the motion is not intended to relieve a party from the consequences of his own negligence."

The petitioner was a doctor of medicine regularly practicing his profession up to the time of trial. Consequently, it should be presumed that as a professional man he kept up with the progress, new developments and new practices in the science of medicine. The petitioner does not justify his negligence either by his failure to keep informed in matters pertaining to his profession or for his failure to present the evidence now desired. The petition is granted in its entirety.

that the evidence, which petitioner seeks to present goes to an issue of fact which was fully adjudicated and hence not relievably by error coram nobis, the issue being whether or not the prosecutrix was pregnant with child. The Supreme Court opinion discloses that the issue of pregnancy was established by proof independent of and in addition to the opinion evidence of the doctor. As before stated, the proof showed acts of sexual intercourse with a named man as of a certain date, cessation of menses immediately thereafter and during a three-month period prior to attending defendant^{pe}-petitioner, certain nervous and functional disorders suffered after the cessation of the menses; also, that defendant Schyman stated she was pregnant; and finally, bleeding and passing water and large clots of blood vaginally after the removal of a catheter which had been inserted into the victim's womb by way of the cervix. In the case of People v. Harvey, 286 Ill. 593, the Supreme Court said;

"There can be no question that the weight to be given the testimony of experts is to be determined by the jury. 'There is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses. . . . Even if several competent experts concur in their opinion and no opposing expert evidence is offered, the jury are still bound to decide the issue upon their own fair judgment assisted by the statements of the experts. . . . Nevertheless, the testimony of an expert may not arbitrarily rejected, but, like the evidence of every other witness, it is to be considered by the jurors, who are to accord to it influence, much or little, according as it appeals to their intelligence and impartial minds in view of all the facts and circumstances developed upon the trial and the common knowledge and experience of mankind, and, when such common knowledge utterly fails, the expert opinion may, of necessity, become controlling.'"

The Supreme Court on Writ of Error in the instant case considered the questions called to its attention and the evidence in the record, and determined the question whether there was sufficient evidence of pregnancy before the jury. In Earnest v. State, 224 S. W. 777, the Court of Criminal Appeals of Texas said;

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"There are no established rules known to this court, or set forth in the testimony in this case, by which pregnancy may be determined in its earlier stages, and none by which we may satisfy ourselves that the state had not made out its case. The cessation of menstruation in a healthy young woman following frequent acts of intercourse with a man, coupled with the statement after examination by one whose profession makes him an expert, to the effect that a baby was started, would seem to make it reasonably certain that the jury was not without justification for their finding that prosecutrix was pregnant."

run in

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that the evidence, which will not seem to present any doubt as to the fact which was fully admitted and hence not in dispute, error coram nobis, the issue being whether or not the defendant was pregnant with child. The Supreme Court opinion discloses that the issue of pregnancy was established by proof independent of and in addition to the opinion evidence of the doctor. As before stated, the great weight of the evidence is in favor of the defendant and hence a certain safe, reasonable of course immediately thereafter and during a three-month period prior to attending defendant's trial, certain nervous and functional disorders suffered after the suggestion of the name; also, that defendant's physician stated she was pregnant; and finally, bleeding and cramping were and large clots of blood were finally after the removal of a catheter which had been inserted into the victim's womb by way of the cervix. In the case of People v. ...

200 Ill. 535, the Supreme Court said:

"There can be no question that the weight to be given to the testimony of experts is to be determined by the jury. There is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses. ... even if several competent experts agree in their opinion and no opposing expert evidence is offered, the jury will come to decide the issue upon their own fair judgment aided by the advice of the experts. ... Nevertheless, the testimony of an expert may not be arbitrarily rejected, but, like the evidence of every other witness, it is to be considered by the juror, and one is bound to it insofar as it is competent, according as it tends to prove or disprove the facts in view of all the facts and circumstances known and testified upon the trial and the common knowledge and experience of mankind, and, when such a view is taken, the expert testimony is to be given its proper weight."

The Supreme Court on this point in the last case considered the questions called to its attention and the evidence in the record, and determined the question whether there was sufficient evidence of pregnancy before the jury. In People v. ..., 200 Ill. 535, the

Court of Criminal Appeals of Texas said:

"There are no established rules known to this court, or set forth in the testimony in this case, by which pregnancy may be determined in its earlier stages, and none by which an expert witness that the state had not made out its case. The question of construction in a highly young woman follows the treatment of laboring with a man, coupled with the statement after examination by one doctor a physician makes him as a woman, to the effect that a baby was present would seem to make it reasonably certain that the jury was not justified for their finding that defendant was pregnant."

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It was upon this question that the jury had to pass in the case, and it would seem that the evidence before it was sufficient for the jury to find the defendant guilty. The fact that petitioner believed the pregnancy test to be reliable does not excuse his lack of diligent preparation for trial, nor show an excusable mistake without negligence. Petitioner's admission that the test is 28^{per cent} correct is an acknowledgment that the test made in the instant case could have been correct, hence showing that the result of the trial could not have been different. The matter sought to be raised refers to an issue appearing on the face of the record, and which, from the facts appearing in evidence, we believe has been fully and finally adjudicated in this case.

There is a case called to our attention by the State which will be of some aid in determining the question-- that of People v. Williams, 242 Ill. 197. In that case defendant claimed his failure to present evidence of an alibi was because he had been unable to remember where he was at the time of the commission of the offense, but the Supreme Court held, that such facts were insufficient for a new trial. Here the petitioner claims that his failure to present evidence challenging opinion evidence on the issue of pregnancy was because he made a mistake of judgment and assumed it wouldn't have availed him anything.

Counsel for the State contend that the defendant has shown by his petition that he made an error in judgment when he failed to present evidence to show that the Antuitrin-S test was unreliable. Petitioner contends that they have gone outside the record, to support this contention. However, it does appear from the petition itself that the attention of the court was directed to the opinion of the Supreme Court in People v. Schyman, 374 Ill. 292, wherein the judgment of conviction was reviewed, and it would seem that such direction

It was upon this question that the jury was to pass in the case, and it would seem that the evidence before it was sufficient for the jury to find the defendant guilty. The fact that the defendant believed the pregnancy test to be reliable does not excuse his lack of diligent preparation for trial, nor show an excusable mistake without negligence. Petitioner's admission that the test is not correct in an unqualified way, meant that the test made in the instant case could have been correct, hence showing that the result of the trial could not have been different. The matter cannot be said to refer to an issue appearing on the face of the record, and which, from the facts appearing in evidence, we believe has been fully and finally adjudicated in this case. There is a case called to our attention in the state which will be of some aid in determining the question - that of People v. Williams, 242 Ill. 197. In that case defendant claimed his failure to present evidence of an alibi was because he had been unable to remember where he was at the time of the commission of the offense, but the supreme court held, that such facts were insufficient for a new trial. Here too petitioner claims that his failure to present evidence challenged the opinion evidence on the issue of pregnancy was because he made a mistake of judgment and assumed it wouldn't have availed him anything. Counsel for the state contend that the defendant has shown by his petition that he made an error in judgment when he failed to present evidence to show that the pregnancy test was unreliable. Petitioner contends that they have gone outside the record, to support this contention. However, it does appear from the petition itself that the attention of the court was directed to the question at the supreme court in People v. Williams, 242 Ill. 197, wherein the judgment of conviction was reversed, and it would seem that such direction

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justified the court in reading the Supreme Court opinion to determine the facts as therein stated. It would seem from such citation of this opinion, and, being the same case and involving the very question called to our attention in the instant appeal, that this court is justified in considering such Supreme Court opinion on the questions before that court. There is a provision in Sec. 16, Par. 21 of Chap. 37 on Courts, Ill. Rev. Stat. 1941, that; "In the decisions of cases submitted to the Supreme Court, the opinions of the justices shall be delivered in writing, and filed with the other papers. Such opinions shall also be spread at large upon the records of the court". Therefore, the opinion is a part of the records to which petitioner makes reference, and as we have stated, we believe we are justified in considering the opinion of the Supreme Court as filed and the effect it would have in the instant case on the petition and question before this court.

Under the circumstances, we are of the opinion that the trial court was not in error in dismissing the petition upon motion of the State. The order of dismissal is affirmed.

AFFIRMED.

BURKE, P. J., AND KILEY, J., CONCUR.

James H. H. State. Dec. 36.011.75

Justified the court in reaching the present conclusion as to the facts as therein stated. It would seem that such a statement of this opinion, and, being the same case and involving the very question called to our attention in the instant appeal, that this court is justified in considering such a statement as the basis of its decision before this court. There is a provision in Sec. 22, Art. VI of the Constitution, that "in the Supreme Court, the opinion of the majority of cases submitted to the court shall be delivered in writing, and filed with the clerk of the court." Such opinions shall also be spread at large upon the records of the court. Therefore, the opinion is a part of the record in which petitioner makes reference, and as we have stated, we believe we are justified in considering the opinion of the Supreme Court as filed and the effect it would have in the instant case in the petition and question before this court.

Under the circumstances, we are of the opinion that the trial court was not in error in dismissing the petition upon motion of the State. The order of dismissal is affirmed.

Reversed.

WILLIAM L. KILLY, J., Clerk.

42077

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

PETER B. SCHYMAN and HORACE B. HANNON,

Defendants.

IN THE MATTER OF ERROR CORAM NOBIS,
PETITION AND MOTION OF PETER B.
SCHYMAN and HORACE B. HANNON,

PETER B. SCHYMAN,

Petitioner-Appellant,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Appellee.

Indictment

ERROR TO THE

CRIMINAL COURT

COOK COUNTY

315 I.A. 493¹

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

ON RE HEARING

This is an appeal by Peter B. Schyman from an order of the Criminal Court of Cook County dismissing a Petition and Motion of Peter B. Schyman and Horace B. Hannon in the nature of a writ of error coram nobis asking the vacation of a judgment of conviction of the crime of abortion because of alleged errors in fact set out in the Motion and Petition. Since the filing of said Petition, Horace B. Hannon has died, and his death suggested of record.

The facts as they appear are that Doctors Peter B. Schyman and Horace Hannon were indicted in the Criminal Court of Cook County on September 18, 1938 for the crime of abortion upon a woman alleged to be pregnant. On the trial a Dr. Bernard J. Froelich testified for the state that he applied a pregnancy test, known to the medical profession as the Antuitrin-S Skin Test, and from the result of that test gave it as his opinion that the prosecutrix was pregnant. Petitioner contends that the testimony of Dr. Froelich was the only

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

PETER B. SCHYMAN and HORACE B. HANNON,

Defendants.

IN THE MATTER OF PROBATE COURT,

PETITION AND MOTION OF PET. B. SCHYMAN

AND HORACE B. HANNON,

PETITIONERS,

Petitioner-Plaintiff,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Defendant.

AND JUSTICE HERBERT HARRISON, CLERK OF THE COURT.

COMPLAINT

This is an appeal by Peter B. Schyman from an order of the Criminal Court of Cook County classifying a Petitioner and Motion of Peter B. Schyman and Horace B. Hannon in the name of a writ of error coram nobis asking the vacation of a judgment of conviction of the crime of abortion because of alleged errors in fact and in the Motion and Petition. Since the filing of said Petition, Horace B. Hannon has died, and his death is stated of record.

The facts as they appear are that between Peter B. Schyman and Horace Hannon were included in the Criminal Court of Cook County on September 18, 1928 for the crime of abortion upon a woman alleged to be pregnant. On the trial a Dr. Richard A. Fessler testified for the state that he applied a pregnancy test, known to the medical profession as the infant-in-a-bath test, and that the result of this test gave it as his opinion that the pregnant was pregnant. Fessler contends that the testimony of Dr. Fessler was the only

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testimony in support of the allegation of pregnancy. Dr. Hawkins testified for the State that after the supposed abortion he found no fetus or sign of placental tissue.

Defendants were found guilty and sentenced upon the verdict of the jury from one to ten years in the penitentiary. Their conviction was reviewed by the Supreme Court on Writ of Error and the judgment affirmed on a per curiam opinion rendered at the April 1940 term, and rehearing was denied at the October 1940 term. (People v. Schyman, 374 Ill. 292.) The mandate of the Court was stayed from time to time until August 13, 1941, during which time defendants were out on bond. This petition was filed on August 8, 1941, on which day Dr. Horace B. Hannon died. Dr. Peter B. Schyman (appellant here) is now in the penitentiary serving his sentence under this conviction.

Petitioner contends that the Antuitrin-S test supplied the sole proof of pregnancy, and that since the trial scientific tests have shown the Antuitrin-S Skin test to be as high as 72% erroneous. Petitioner states that, there having been no issue made as to the accuracy of the Antuitrin-S test on the trial, its scientific accuracy having been assumed, and the conviction having been based upon its assumed accuracy, and it subsequently having been scientifically ascertained and proven that the test is 72% erroneous, the question here presented is whether the defendant can under such circumstances be relieved of such a conviction by a motion in the nature of a Writ of Error coram nobis. It is suggested that the court was led to take judicial cognizance of the supposed fact, that such method of determining pregnancy had been so far scientifically established by test and experience that it could be judicially noticed as a means of supplying proof of pregnancy. Petitioner contends that the error here complained of is one of fact and is such error as is within the purview of section 72 of the Civil Practice Act and within the principle governing relief in such cases, and within the field of error which the motion in the nature of a Writ of Error coram nobis provision of the statute was designed to relieve.

testimony in support of the allegation of pregnancy. The medical testimony for the state that after the supposed abortion no fetus or sign of placental tissue.

Defendants were found guilty and sentenced under the verdict of the jury from one to ten years in the penitentiary. Their conviction was reviewed by the Supreme Court on writ of error and the judgment affirmed on a per curiam opinion rendered at the April 1940 term, and the hearing was denied at the October 1940 term. (*People v. [redacted]*, 311 Ill. 292.) The mandate of the Court was stayed from time to time until August 17, 1941, during which time defendants were out on bond. This petition was filed on August 3, 1941, on which day Dr. Robert W. Johnson died. Dr. Peter B. Johnson (petitioner) is now in the penitentiary serving his sentence under this conviction.

Petitioner contends that the Antitritin test supplied the sole proof of pregnancy, and that since the trial scientific tests have shown the Antitritin test to be as high as 75% accurate. Petitioner states that, there having been no issue made as to the accuracy of the Antitritin test on the trial, the scientific accuracy of the test has been assumed, and the conviction having been based upon the assumed accuracy, and it subsequently having been scientifically established and proven that the test is 75% accurate, the conviction must be reversed. Whether the defendant can under each circumstance be relieved of such a conviction by a motion in the nature of a writ of habeas corpus. It is suggested that the court was in an unusual position in the case of the supposed fact, that such motion of determining pregnancy had been so far scientifically established by test and evidence that it could be judicially noticed as a matter of public knowledge and is one of fact and is such error as is within the purview of section 75 of the Civil Practice Act and within the principle governing relief in such cases, and within the field of error which the motion in the nature of a writ of habeas corpus is within the purview of the statute was designed to relieve.

The petitioner suggests that the motion in the nature of a Writ of Error coram nobis is proper for relief against a judgment where the court, counsel, litigants and witnesses have mistakenly assumed the existence of a scientific test, upon which proof of some ultimate fact necessarily rests, when later it is shown that such supposed scientific fact is in reality a scientific error.

The State, in reply to petitioner's contentions, suggests that the criminal court conviction did not rest upon opinion evidence alone to establish the fact of pregnancy. The Supreme Court decision, which was made a part of the petition by reference, disclosed acts of sexual intercourse with a named man, followed by a cessation of menses during the three-month period prior to attending the defendant doctor, certain nervous and functional disorders suffered after the cessation of the menses, and bleeding and passing water and large clots of blood vaginally after the removal of a catheter which had been inserted into the victim's womb by way of the cervix. By way of reply, the State suggests that a test allegedly 28% reliable does not establish an error of fact relievable by error coram nobis in the instant case.

In the case of People v. Bruno, 346 Ill. 449, the claim was made that a defense was not presented due to an error of judgment on the part of accused. The court there said:

"While the motion provided for in section 89 of the Practice Act to correct errors of fact may be availed of by a party who without fault or negligence has been prevented from making a defense, yet the motion is not intended to relieve a party from the consequences of his own negligence."

The petitioner was a doctor of medicine regularly practicing his profession up to the time of trial. Consequently, it should be presumed that as a professional man he kept up with the progress, new developments and new practices in the science of medicine. The petitioner does not justify his negligence either for his failure to keep informed in matters appertaining to his profession or for his failure to present the evidence now desired. The petition in question discloses that the evidence, which petitioner seeks to present goes to an issue of fact which was fully adjudicated and hence not relievable by error coram nobis.

The petition suggests that the action is the nature of a writ of error coram nobis is proper for relief against a judgment where the court, counsel, litigant and witnesses have collectively assumed the existence of a scientific fact, upon which proof of some mistake is not necessarily needed, when later it is shown that such fact was a scientific fact in reality a scientific error.

The state, in reply to petitioners' submission, suggests that the criminal court conviction did not rest upon scientific evidence alone to establish the fact of pregnancy. The Supreme Court decision, which was made a part of the petition by reference, discussed facts as actual intercourse with a named man, followed by a cessation of menses during the three-month period prior to attending the defendant doctor, certain nervous and functional disorders and other factors, and bleeding and passing water and large clots of blood vaginally after the removal of a catheter which had been inserted into the victim's womb by way of the cervix. By way of reply, the state suggests that a fact allegedly established by the evidence in the case of People v. Smith, 221 Ill. 411, 412, the state made that a defense was not presented due to an error of judgment on the part of accused. The court there said:

"While the action provided for in section 133 of the Criminal Code to correct errors of fact may be available to a party who claims fault or negligence has been prevented from making a defense, yet the action is not intended to relieve a party from the consequences of his own negligence."

The petitioner was a doctor of medicine regularly practicing his profession up to the time of trial. Consequently, it would be reasonable that as a professional man he kept up with the progress, new inventions and new practices in the science of medicine. The petitioner does not justify his negligence either for his failure to keep informed in matters pertaining to his profession or for his failure to present the evidence now desired. The petition is entitled to succeed since the evidence, which petitioner claims to present does so on issue of fact which was fully adjusted and hence not reliable on error coram nobis.

the issue being whether or not the prosecutrix was pregnant with child. The Supreme Court opinion discloses that the issue of pregnancy was established by proof independent of and in addition to the opinion evidence of the doctor. As before stated, the proof showed acts of sexual intercourse with a named man as of a certain date, cessation of menses immediately thereafter and during a three month period prior to attending defendant-petitioner, certain nervous and functional disorders suffered after the cessation of the menses; also, that defendant Schyman stated she was pregnant; and finally, bleeding and passing water and large clots of blood vaginally after the removal of a catheter which had been inserted into the victim's womb by way of the cervix.

In the case of People v. Harvey, 286 Ill. 593, the Supreme Court said;

"There can be no question that the weight to be given the testimony of experts is to be determined by the jury. 'There is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses. * * * Even if several competent experts concur in their opinion and no opposing expert evidence is offered, the jury are still bound to decide the issue upon their own fair judgment assisted by the statements of the experts. * * * Nevertheless, the testimony of an expert may not be arbitrarily rejected, but, like the evidence of every ~~xxx~~ other witness, it is to be considered by the jurors, who are to accord to it influence, much or little, according as it appeals to their intelligence and impartial minds in view of all the facts and circumstances developed upon the trial and the common knowledge and experience of mankind, and, when such common knowledge utterly fails, the expert opinion may, of necessity, become controlling. * * *'"

The Supreme Court on Writ of Error in the instant case considered the questions called to its attention and the evidence in the record, and determined the question whether there was sufficient evidence of pregnancy before the jury. In Earnest v. State, 224 S.W. 777, the Court of Criminal Appeals of Texas said:

"There are no established rules known to this court, or set forth in the testimony in this case, by which pregnancy may be determined in its earlier stages, and none by which we may satisfy ourselves that the state had not made out its case. The cessation of menstruation in a healthy young woman following frequent acts of intercourse with a man, coupled with the statement after examination by one whose profession makes him an expert, to the effect that a baby was started, would seem to make it reasonably certain that the jury was not without justification for their finding that prosecutrix was pregnant."

It was upon this question that the jury had to pass in the case, and it would seem that the evidence before it was sufficient for the jury to find the defendant guilty. The fact that petitioner believed the

pregnancy test to be reliable does not excuse his lack of diligent preparation for trial, nor show an excusable mistake without negligence. Petitioner's admission that the test is 28% correct is an acknowledgment that the test made in the instant case could have been correct, hence showing that the result of the trial could not have been different. The matter sought to be raised refers to an issue appearing on the face of the record, and which, from the facts appearing in evidence, we believe has been fully and finally adjudicated in this case.

There is a case called to our attention by the State which will be of some aid in determining the question - that of People v. Williams, 242 Ill. 197. In that case defendant claimed his failure to present evidence of an alibi was because he had been unable to remember where he was at the time of the commission of the offense, but the Supreme Court held that such facts were insufficient for a new trial. The counsel for the State urges that here the petitioner claims that his failure to present evidence challenging opinion evidence on the issue of pregnancy was because he made a mistake of judgment and assumed it wouldn't have availed him anything.

Counsel for the State contend that the defendant has shown by his petition that he made an error in judgment when he failed to present evidence to show that the Antuitrin-S test was unreliable. Petitioner contends that they have gone outside the record, to support this contention. However, it does appear from the petition itself that the attention of the court was directed to the opinion of the Supreme Court in People v. Schyman, 374 Ill. 292, wherein the judgment of conviction was reviewed, and it would seem that such direction justified the court in reading the Supreme Court opinion to determine the facts as therein stated. It would seem from such citation of this opinion, and, being the same case and involving the very question called to our attention in the instant appeal, that this court is justified in considering such Supreme Court opinion on the questions before the court. There is a provision in Sec. 16, Par. 21 of Chap. 37 on Courts, Ill. Rev. Stat. 1941, that: "In the decisions of cases

pregnancy test to be reliable does not require his lack of ability to
 preparation for trial, nor does an erroneous statement without negli-
 gence. Petitioner's contention that the test is 100% correct is an un-
 knowledgeable statement that the test made in the instant case would have been
 correct, hence showing that the result of the trial would not have been
 different. The matter sought to be raised refers to an issue occurring
 on the face of the record, and which, from the facts appearing in evi-
 dence, we believe has been fully and fairly adjusted in this case.
 There is a case called to our attention by the State which
 will be of some aid in determining the question - that is People v.
Williams, 243 Ill. 187. In that case defendant claimed his failure
 to present evidence of an alibi was because he had been unable to re-
 member where he was at the time of the commission of the offense, but
 the Supreme Court held that such facts were insufficient for a new
 trial. The counsel for the State argues that here the petitioner claims
 that his failure to present evidence constituted an error of judgment and
 the issue of pregnancy was because he made a mistake of judgment and
 assumed it wouldn't have affected his testimony.

Counsel for the State contends that the defendant has shown
 by his petition that he made an error in judgment when he failed to
 present evidence to show that the intrusion was not intentional.
 Petitioner contends that they have gone outside the record, to suggest
 this contention. However, it does appear from the petition itself
 that the attention of the court was directed to the matter of the
 Supreme Court in People v. Brown, 273 Ill. 405, wherein the judgment
 of conviction was reversed, and it would seem that such attention has
 called the court in reaching the Supreme Court ought to be taken into
 consideration. It would seem from such attention that
 petition, and, being the case and involving the very question
 called to our attention in the instant appeal, that this court is jus-
 tified in considering such Supreme Court opinion as the question be-
 fore the court. There is a reversal in 201 Ill. 101, 102 of 1907. 17
 Ill. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

submitted to the Supreme Court, the opinions of the justices shall be delivered in writing, and filed with the other papers. Such opinions shall also be spread at large upon the records of the court." Therefore, the opinion is a part of the records to which petitioner makes reference, and as we have stated, we believe we are justified in considering the opinion of the Supreme Court as filed and the effect it would have in the instant case on the petition and question before this court.

Under the circumstances, we are of the opinion that the trial court was not in error in dismissing the petition upon motion of the State. The order of dismissal is affirmed, and the opinion of the court as herein corrected is adhered to on petition for rehearing.

AFFIRMED.

BURKE, P.J., and KILEY, J. CONCUR.

submitted to the Supreme Court, the opinion of the majority will be delivered in writing, and filed with the Court records. The opinion will also be printed at large with the records of the Court. Therefore, the opinion is a part of the records of the Court. Hence, the opinion, and as we have stated, we believe we are justified in considering the opinion of the Supreme Court as filed with the effect it would have in the instant case on the petition and decision before this court.

Under the circumstances, no use of the opinion of the majority will be made in this case. The opinion of the majority will be filed with the records of the Court. The opinion of the majority will be printed at large with the records of the Court. Therefore, the opinion is a part of the records of the Court. Hence, the opinion, and as we have stated, we believe we are justified in considering the opinion of the Supreme Court as filed with the effect it would have in the instant case on the petition and decision before this court.

ATTORNEYS.

SMITH, J. J., and KELLY, J., JUDGES.

42334

NU-ENAMEL NORTOWN DISTRIBUTORS, INC.,
a corp.,

~~Plaintiff - Appellee,~~

v.

NU-ENAMEL CORPORATION,

~~Defendant - Appellant.~~

315 I.A. 94

APPEAL FROM

INTERLOCUTORY ORDER

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant from an order for an interlocutory injunction entered in the Circuit Court of Cook County on May 15, 1942, upon a verified complaint filed May 12, 1942. On May 13, 1942, complainant notified defendant that it would, on May 14, 1942, move that a temporary injunction should issue as prayed for in its complaint. Defendant appeared, and the Court, upon consideration of the verified complaint and the argument of counsel for the respective parties, entered the order for the reversal of which this appeal is prosecuted.

As suggested by defendant, in view of the fact that the order for injunction is based solely upon the verified complaint, it is proper and necessary to set forth that pleading at some length. Paragraph One of the complaint merely alleges the corporate existence of plaintiff, and paragraph Two the like existence of defendant, both of which facts are admitted. In paragraph Three it is said;

"That on the 25th day of August, 1941, for good and valuable consideration, each to the other in hand paid, and in consideration of the plaintiff purchasing the business owned by the plaintiff at 3221 N. Ashland Ave., Chicago, Illinois, plaintiff and defendant herein entered into a written agreement, a copy of which is hereto attached and expressly made a part hereof as Exhibit 'A'."

A reference to the written contract establishes that it states that it is made "in consideration of the reciprocal undertakings, covenants and agreements as hereinafter set forth." Paragraph Four of the complaint alleges "that pursuant to the agreement hereinabove referred

to as Exhibit 'A' the plaintiff entered into the retail paint business and engaged in an intensive campaign to promote, advertise and sell exclusively the products referred to in the said agreement, and carried out all of the terms of the said agreement hereto attached and referred to as Exhibit 'A' which were incumbent upon the plaintiff to perform". Paragraph Five alleges:

"That in accordance with the terms and conditions of the contract hereinabove referred to the plaintiff was to be the exclusive distributor for all products bearing the trademarks or tradenames; 'Nu-Enamel', 'Star Brite', or 'Community' within the territory described in said Exhibit 'A'."

The complaint then further alleges:

"6. That on to-wit: April 16, 1942, the defendant corporation forwarded unto the plaintiff a letter, copy of which is hereto attached as Exhibit 'B', by virtue of which said letter the defendant arbitrarily, and without justification, abrogated, breached and cancelled the contract by and between the parties hereto.

"7. That prior to April 30, 1942, the exact dates of which are unknown to the plaintiff, but which will be more specifically set forth at the hearing in the above entitled cause, the defendant, in violation of its agreement hereinabove referred to as Exhibit 'A', authorized and empowered other and divers persons to engage in the sale of the products manufactured and distributed by the defendant corporation within the territory exclusively reserved unto the plaintiff as the authorized exclusive distributor for the products of the defendant corporation, as more fully set forth in Exhibit 'A', and that on or about the 6th day of May, 1942, the defendant corporation forwarded unto the plaintiff a letter, copy of which is hereto attached as Exhibit 'C' and expressly made a part hereof, and immediately thereafter informed the plaintiff that it would not sell any of its products to the plaintiff corporation.

"8. That by virtue of the fact that the contract between the parties hereinabove referred to required the plaintiff to deal with the products and branded merchandise manufactured and distributed exclusively by the defendant corporation, the plaintiff has established a great amount of good will in the territory assigned to it in the contract between the parties hereto, and that by further reason of the fact that the plaintiff has refused to sell any of its products unto the plaintiff, the defendant will be unable to continue in business and will suffer irreparable damage, the effect, nature and amount of which is uncertain and difficult of ascertainment; that in addition thereto, these acts on the part of the defendant corporation constitute a direct violation of the terms of the contract above referred to as Exhibit 'A', and have caused and will cause great and irreparable injury to the plaintiff in that by reason of the extensive advertising and sales promotion work done by the plaintiff and that the defendant corporation through its other and divers distributors who are now selling the products of the defendant corporation within the territory exclusively reserved unto the plaintiff as per Exhibit 'A', are in direct competition with the plaintiff, and that the damages resulting from the wrongful acts of the defendant corporation

to as Exhibit 'A' the plaintiff at no time the retail value...
and engaged in an intensive campaign to promote, advertise and sell...
exclusively the products referred to in the said paragraph, and...
carried out all of the terms of the said paragraph in respect of...
and referred to as Exhibit 'A' which were inconsistent with the plaintiff's...
to perform", Paragraph Five alleges:

"That in accordance with the terms and conditions of the...
contract heretofore referred to the plaintiff was to be the exclusive...
distributor for all products bearing the trademarks or trade names...
'Nu-Tanmel', 'Star Brand', or 'Community' within the territory...
described in said Exhibit 'A'."

The complaint then further alleges:

"6. That on or about April 1, 1943, the defendant corporation...
action forwarded unto the plaintiff a letter, copy of which is hereto...
attached as Exhibit 'B', by virtue of which said letter the defendant...
arbitrarily, and without justification, threatened, threatened and...
annulled the contract by and between the parties hereto."

"7. That prior to April 30, 1943, the defendant corporation...
was unknown to the plaintiff, but it will be more specifically set...
forth at the hearing in the above entitled cause, the defendant in...
violation of its agreement heretofore referred to as Exhibit 'A',...
authorized and empowered other and diverse persons to engage in the...
sale of the products manufactured and distributed by the defendant...
corporation within the territory exclusively reserved unto the...
plaintiff as the authorized exclusive distributor for the defendant...
of the defendant corporation, as more fully set forth in Exhibit 'A',...
and that on or about the 1st day of May, 1943, the defendant corporation...
then forwarded unto the plaintiff a letter, copy of which is hereto...
attached as Exhibit 'C' and expressly made a part of the contract...
immediately thereafter informed the plaintiff that it would no longer...
any of its products to the plaintiff corporation."

"8. That by virtue of the fact that the contract between...
the parties heretofore referred to required the plaintiff to deal...
with the products and brands mentioned hereinbefore and distributed...
exclusively by the defendant corporation, and plaintiff has...
a great amount of good will in the territory assigned to it in the...
contract between the parties hereto, and that by reason of...
the fact that the plaintiff has refused to sell any of its products...
unto the plaintiff, the defendant will be unable to continue in...
business and will suffer irreparable injury, the effect of which...
amount of which is uncertain and difficult of ascertainment; that in...
addition thereto, these acts on the part of the defendant corporation...
constitute a direct violation of the terms of the contract above...
referred to as Exhibit 'A', and have caused and will cause great and...
irreparable injury to the plaintiff in that by reason of the...
advertising and sales promotion work done by the plaintiff and that...
the defendant corporation through its other and diverse distributors...
who are now selling the products of the defendant corporation...
the territory exclusively reserved unto the plaintiff as per...
'A', are in direct competition with the plaintiff, and that the...
damages resulting from the wrongful acts of the defendant corporation...

are in their nature uncertain, difficult of ascertainment and of a nature too speculative to be covered by a suit at law, and that therefore the plaintiff has no adequate remedy in a suit at law."

The complaint concludes;

"Wherefore, plaintiff prays:

"(a) That this Honorable Court issue an interlocutory injunction restraining the defendant from selling the various products set forth in the contract hereinabove referred to as Exhibit 'a' to any other person other than the plaintiff for resale within the territory reserved in the said contract unto the plaintiff as the exclusive distributor, until further order of the Court.

"(b) That this Honorable Court issue a mandatory injunction compelling the defendant corporation to continue selling and supplying merchandise to the plaintiff pursuant to the terms of the said contract hereinabove set forth as Exhibit 'A', so that the plaintiff corporation will be able to continue its business until further order of the court.

"(c) That this Honorable Court, upon a full hearing, grant unto the plaintiff such permanent injunction as equity shall require, and as to the court shall seem meet.

"(d) That this Honorable Court enter such further orders and grant such other and further relief as may be required and as to the court shall seem meet."

Attached to the complaint is the affidavit of O. E. Anderson, who swears that he is the duly authorized agent of the plaintiff; "that he has read the foregoing complaint by him subscribed, knows the contents thereof and that the same is true."

Based solely on the allegations of the complaint, the trial court entered the following order, to reverse which this appeal is prosecuted:

"This cause Coming On to Be Heard on the Complaint and Motion of Nu-Enamel Nortown Distributors, Inc., a corporation, plaintiff in the above entitled cause by Blum & Jacobson, its attorneys, and upon due and proper notice of the application for writ of mandatory injunction having been given to the defendant and both parties plaintiff and defendant having appeared in open court, and the court having heard the arguments of counsel and being fully advised in the premises, and the court finding that the rights of the plaintiff will be unduly prejudiced and that the plaintiff will suffer irreparable damage if a mandatory writ of injunction be not issued immediately;

"It Is Hereby Ordered that the Clerk of this Court issue a mandatory writ of injunction, without bond, (it appearing to the Court that for good cause shown that said writ of mandatory injunction ought to be granted without bond,) compelling the defendant, Nu-Enamel

[illegible]

The complaint contains:

1947-1948, "The Year of the Dragon"

[illegible]

(d) That the defendant's conduct is such as to compel the defendant corporation to continue to contribute to the maintenance of the defendant corporation's business, and that the defendant corporation will be able to continue its business without further contribution.

(c) That the Court shall have jurisdiction to grant relief as herein provided.

"(5) That this Honorable Court enter and render orders and grant such other and further relief as may be required and as the court shall deem just."

It should be noted that the only authority of the Government is the Ministry of the Interior, which is the only authority of the Government.

he has read the foregoing complaint by him submitted, and we are
convinced that it is true.

[illegible]

"It is hereby ordered that the Clerk of said Court shall

Corporation, to sell and continue selling and supplying merchandise to the plaintiff pursuant to the terms of the contract between the parties plaintiff and defendant hereto, a copy of which is set forth and attached to the complaint heretofore filed herein as Exhibit 'A' and to continue making such sales unto the defendant until the further order of this court, upon the issues joined."

Appellant contends that the order granting injunctive relief, without bond, violated the express terms of the statutes of this State; that the vital allegations in Paragraph Eight of the Complaint herein are not expressed in proper English language, but that they are self-contradictory and meaningless; that the order entered by the trial court based upon the complaint herein, and the exhibits thereto attached, is likewise self-contradictory and was entered inadvertently; that the complaint herein is in other respects insufficient to justify the entry of an order for a temporary injunction; that the complaint herein, and the exhibits attached thereto, shows that plaintiff has a complete and adequate remedy at law; and finally that on the matters appearing in this record no mandatory writ of injunction should have issued.

With regard to appellant's contention that the injunctive order was issued in violation of the express terms of the statute, it is submitted that, by Section 8, Chapter 69 of the Revised Statutes of Illinois, 1941, before an injunction shall issue to enjoin a judgment the plaintiff shall give bond in double the amount of such judgment with sufficient surety, approved by the court, judge or master, conditioned for the payment of all monies and costs due to the owner of the judgment, and such damages as may be awarded against the plaintiff in case the injunction is dissolved; and that section 9 of that act provides:

"In all other cases before an injunction shall issue, the plaintiff shall give bond in such penalty and upon such condition and with such security as may be required by the court, judge or master, granting or ordering the injunction. Provided, bond need not be required when for good cause shown, the court, judge or master, is of opinion that the injunction ought to be granted without bond."

As an authority for appellant's position, the case of Kellogg v. Kellogg, 295 Ill. App. 386, is cited, where the court in construing this statutory provision said:

Corporation, to sell and continue selling and supplying products to the plaintiff pursuant to the terms of the contract between the parties, plaintiff and defendant hereto, a copy of which is set forth and attached to the complaint heretofore filed herein as Exhibit 'A' and to continue making such sales until the further order of this court, when the issues join."

Appellant contends that the order granting injunctive relief, without bond, violated the express terms of the contract of this date; that the vital allegations in paragraph 1 of the complaint herein are not expressed in proper English language, but that they are self-contradictory and meaningless; that the order entered by the trial court based upon the complaint herein, and the exhibits thereto attached, is likewise self-contradictory and was entered incompetently; that the complaint herein is in other respects incompetent to justify the entry of an order for a temporary injunction; that the complaint herein, and the exhibits attached thereto, shows that plaintiff has a complete and adequate remedy at law; and finally that on the merits appearing in this record no mandatory writ of injunction should have issued.

With regard to appellant's contention that the injunctive order was issued in violation of the express terms of the contract, it is submitted that, by Section 8, Chapter 83 of the Revised Statutes of Illinois, 1941, before an injunction shall issue to restrain a defendant the plaintiff shall give bond in double the amount of such judgment, with sufficient surety, approved by the court, judge or master, conditioned for the payment of all costs and damages due to the party of the judgment, and such damages as may be awarded against the plaintiff in case the injunction is dissolved; and that Section 9 of said act provides:

"In all other cases where an injunction shall issue, the plaintiff shall give bond in such sum as the court shall determine with such surety as may be required by the court, judge or master, conditioned for the payment of all costs and damages due to the party of the judgment, and such damages as may be awarded against the plaintiff in case the injunction is dissolved; and such damages as may be awarded against the plaintiff in case the injunction is dissolved without bond."

As an authority for appellant's position, the case of Illinois v. Kellon, 235 Ill. App. 2d, is cited, where the court in commenting this statutory provision said:

"As appears from the order itself, the part of the order providing, 'that for good cause shown in the petition, petitioner is excused from giving bond' does not comply with the statutory provision just quoted (Chap. 69, Sec. 9, Injunctions).

"The petition itself and the amendment thereto do not state any facts from which it would appear there was justification for that part of the order directing that the petitioner be excused from giving bond.

"In Peck v. Peck, 214 Ill. App. 41, the court on the question of granting an injunction without bond said: 'Again, the injunction was granted without bond and no reason for waiving the requirement of the statute that a bond should be exacted is found in the order, nor does any reason for dispensing with a bond appear in the supplemental bill or by any affidavit supporting the same.'

And in Wagner v. Okner, 306 Ill. App. 601, the court said:

"We are further of opinion that the court should have required plaintiff to give bond as the statute provides. The statute is plain and unambiguous and should be followed. The fact that the order appealed from provided that the injunction issue 'without notice and without bond for good cause shown' is wholly insufficient since no good cause is shown by the record."

To the same effect is the cited case of Kessie v. Talcott, 305 Ill. App. 627. The appellant submits that in the light of the foregoing cases, the order was improvidently entered, and that its entry violates the express terms of the statute.

The plaintiff's reply to the suggestions offered by defendant, in support of defendant's position that the injunctive order of May 15, 1942 without bond is in violation of the terms of the statute for failure to set up facts to justify the terms of the order "without bond for good cause shown", is, after quoting section 9, Ch. 69, Ill. Rev. Stat. 1941, to cite the case of Emerson v. Fox, et al., 177 Ill. App. 141, in support of plaintiff's position that the court acted properly in issuing the injunctive order without bond. In the Emerson case the court said:

"It is urged that the court erred in ordering that the injunction should issue without bond. We are of the opinion that under the facts and circumstances shown in the Bill of Complaint as to the nature of the relief sought, and the situation of the parties, complainant and defendants, the Court did not abuse its discretion in ordering that the injunction issue without bond. No special damages could result to appellants from restraining the prosecution of the action at law other than those occasioned by mere delay * * * If upon

a sufficient showing an injunction bond should be required, the Chancellor before whom the case is pending, may order a bond to be given upon such terms and conditions as may be just and equitable. That is a matter still within the control of the Chancellor, and we must assume that it will be properly exercised."

We quite agree with the above quotation made by plaintiff, but really the question involved is what facts are shown that would justify the court in exercising its discretion in exousing plaintiff from giving bond. It does not appear from anything which we have been able to learn from the record that there are any facts to justify the exercise of such discretion in directing that the injunction issue without bond upon good cause shown. In the case of Kessie v. Talcott, 305 Ill.

App. 527, the court said, in part:

" * * * These allegations, in our opinion, would not authorize the issuance of the preliminary injunction without notice and certainly not without bond. Evidently the chancellor, upon the motion to dissolve, came to the conclusion that he erred at the time the preliminary injunction was issued in not requiring a bond because he then made a continuance of the preliminary injunction conditional upon appellees filing a \$200.00 bond. If the preliminary injunction should not have issued without a bond, then this subsequent order in no way cures the defect. * * *"

Therefore, as we have stated, we are of the opinion that the court erred in its exercise of discretion in entering the order prayed for by the plaintiff without bond.

A further question which we regard as important in passing upon this appeal is whether a mandatory injunction should have been issued upon the verified complaint and exhibits attached thereto, and we are of the opinion that no mandatory injunction should have been issued upon the facts in this record. As is urged by defendant, under the circumstances appearing in this record, it is the contention that the granting of the mandatory injunction of May 15th was equivalent to an order specifically enforcing the contract. Defendant cites, as authority that under the law no such order should have been entered, the case of Cleaning Association v. Sterling Evers, 278 Ill. App. 70, where the court said:

a sufficient showing an injunction being shown by the record, the Chancellor before whom the case is pending, may grant a writ of habeas corpus, and conditions as set by the Chancellor, and that is a matter still within the control of the Chancellor, and we must assume that it will be properly controlled.

Quite a few with the above quotation made by the Chancellor, but really the question involved is what facts are shown that would justify the court in exercising its discretion in granting a writ of habeas corpus. It is not proper to say that when we have been able to learn from the record that there are any facts to justify the exercise of such discretion in directing that an injunction issue without bond, when such cases shown, in the case of James v. Lathrop, 200 Ill.

App. 627, the court said, in part:

"These allegations, in our opinion, would not justify the issuance of the preliminary injunction without bond, and certainly not without bond. The Chancellor, in granting the motion to dissolve, came to the conclusion that he was of the opinion that the preliminary injunction was issued in not granting a writ of habeas corpus. He then made a continuance of the preliminary injunction conditional upon appellee filing a \$500.00 bond. If the preliminary injunction should not have been issued without bond, then this court would be in any case the same."

Therefore, as we have stated, we are of the opinion that the court erred in its exercise of discretion in entering the writ of habeas corpus by the plaintiff without bond.

A further question which we raised in James v. Lathrop is whether upon this record is there a mandatory injunction which should issue without bond upon the verified complaint and exhibits attached thereto, and we are of the opinion that no mandatory injunction should issue upon the facts in this record. It is urged by the appellant that the circumstances appearing in this record, it is the contention that the granting of the mandatory injunction by the court was unlawful, as to an order specifically enjoining the respondent, Attorney at Law, to an order that under the law no more orders should be made entered, the case of James v. Lathrop, 200 Ill. App. 627, where the court said:

"The rule is that caution should be exercised in the issuance of a mandatory injunction based upon the sworn bill of complaint alone. The plaintiff must make out a clear case, free from doubt or dispute, as a basis for its issuance. Where, as in the instant case, complete relief may be afforded the complainant upon a final hearing, upon the facts stated in the bill, the plaintiffs are not entitled to a temporary injunction which is mandatory in character."

And in Almar Forming Machine Co. v. F. & W. Company, 301 Ill. App. 591, it is said:

"The primary purpose of issuing an injunction in any case is to maintain a status which exists and to cause no change until a hearing can be had, but it is not usually permissible as a preliminary injunction to issue what is known as a mandatory injunction which changes the status. In addition to this such multitudinous and detailed activities of individuals are not supervised and directed by a court of equity and the order directing that this be done should not have been entered."

And thus it seems from the suggestions offered that the defendant is ordered to continue to manufacture products under the names of "Nu-nahel", "Star Brite" and "Community" and to continue to sell them to the plaintiff until the further order of the court; in other words the contract which defendant had expressly abrogated because of plaintiff's alleged default, which default plaintiff nowhere excuses, is, by the injunctive order of May 15, 1942, restored to full vigor. Plaintiff, however, contends that the verified complaint and exhibits indicate that it has no adequate remedy at law. Plaintiff quite agrees with the cases cited by defendant in support of its position that the injunctive order does more than require the maintenance of the status quo and in reality effects complete relief as prayed for by the plaintiff, but contends that the cases are not controlling in the instant cause. Counsel for plaintiff contends that the mandatory injunctive order merely maintains the status quo until a full hearing of the issues. However, when we examine the order that was entered, the defendant is compelled to manufacture its products and continue to sell them and supply merchandise to plaintiff pursuant to the terms of the contract between the parties. The prayer of the complaint is to the same effect - that is, that the court issue a mandatory injunction compelling

not entitled to a temporary injunction which is necessary in order to
final hearing, upon the facts recited in the bill, and of course a
instant case, complete relief may be granted by way of injunction
doubt or dispute, as a basis for the injunction, there is no
of the bill. The finding of fact is that the defendant is in pos-
session of a valuable property which is the subject of the bill, and
the bill is that a writ should be granted in the

[illegible]

and thus it seems from the way in which the document is

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defendant to continue selling and supplying merchandise to the plaintiff pursuant to the terms of the said contract, and that the court, upon a full hearing, grant to plaintiff such permanent injunction as equity shall require, and as to the court shall seem meet. This means nothing more than that defendant be compelled to continue on making sales under the contract.

For the reasons stated the temporary injunction order entered May 15, 1942, is reversed.

ORDER REVERSED.

BURKE, P.J. AND KILEY, J. CONCUR.

defendant to continue selling and supplying merchandise at the
plaintiff pursuant to the terms of the said contract, and that the
court, upon a full hearing, grant to plaintiff such equitable
injunctive as equity shall require, and as to the costs shall stay
the court. This means nothing more than that defendant be compelled to
continue on making sales under the contract.

For the reasons stated the temporary injunctive order

entered July 12, 1942, is reversed.

ORDER REVERSED.

BURKE, J., and ALLEY, J. CONCUR.

315 I.A. 113

315 I.A. 113
Adm. Pt. 6
9-15-42
(case)

Abstract

Gen. No. 9781.

Agenda No. 7.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1942.

972
214

In the Matter of the
LEWIS E. INGALLS TRUST.

MYRA H. PEALE, et al., Beneficiaries,
Appellants,

vs.

ARTHUR J. HUGHES,
Appellee.

315 I.A. 113

Appeal from
Circuit Court,
Will County.

WOLFE,-- J.

On August 7, 1937, George Woodruff as Successor Trustee of the Estate of Lewis E. Ingalls, Deceased, filed a petition in the Circuit Court, in the proceeding involving the administration of the Lewis E. Ingalls Trust for the allowance of fees for his attorney, Arthur J. Hughes. The amount sought by the petitioner for the attorney's services was \$15,000.00. Heretofore the sum of \$8,750.00 had been

RECEIVED

March 10, 1917

Comm. No. 2731

IN THE
COURT OF THE DISTRICT OF COLUMBIA
SINGLE DISTRICT
SAY THIS 10th DAY OF MARCH

In the matter of the
Estate of Lewis E. Ingalls, deceased.

MYRA H. PRALL, of A.D., Respondent,
vs.
ARTHUR J. INGALLS, Appellee.

Arthur J. Ingalls
District Court,
Washington, D.C.

WOLFE, -- 1.

On August 7, 1907, George Washington and Margaret Thompson
of the Estate of Lewis E. Ingalls, deceased, filed a petition in the
District Court, in the proceedings involving the liquidation of the
Lewis E. Ingalls Trust for the purpose of paying the said debt,
Arthur J. Ingalls. The amount sought in the petition for liquidation
services was \$15,000.00. The petition was signed by Mr. Ingalls and

2.

allowed the trustee for attorney's fees, and he sought to have an additional allowance of \$6,250.00. Upon a hearing, the Court allowed him \$1,250.00, making a total of \$10,000.00. From this order the beneficiaries of the Ingalls Trust appealed, and George Woodruff, Trustee, has filed a cross-appeal. Appellee insists that the allowance of \$1,250.00 additional as fees was contrary to the manifest weight of the evidence, and is insufficient.

The record discloses that Arthur F. Hughes was employed as the attorney for the Trustee, George Woodruff, to represent him, and the beneficiaries under the trust estate of Lewis E. Ingalls, in prosecuting the Joliet Trust and Savings Bank, a joint trustee, to recover securities or the value thereof, that said bank had illegally purchased from themselves. This case is reported in 276 Ill. App. on Page 445.

Mr. Hughes was called as a witness to testify as to the services he had rendered in the estate, and the results thereof. Over the objection of the attorney for the appellant, he was permitted to testify that, in his opinion, the sum of \$15,000.00 would be a reasonable fee for the services that he and his firm had rendered to the trust estate. Also over the objection of the appellants, Mr. Hughes testified not only as to the time that he had spent in the prosecution of this suit, but as to time spent by his associates. It is objected that Mr. Hughes could not have any personal knowledge of the time that

allowed the trustee for attorney's fees, and was allowed to have an additional allowance of \$3,237.00. From a master, the trustee allowed him \$1,237.00, making a total of \$4,474.00. In order the beneficiaries of the English Trust, and being Woodruff, trustee, was given a check-book, and was given the allowance of \$1,237.00 additional as fees and charges for the manifest weight of the evidence, and is manifest.

The record discloses that Andrew J. Woodruff was employed as the attorney for the trustee, George Woodruff, a resident in, and the beneficiaries under the trust estate of Andrew J. Woodruff, in prosecuting the United Trust and Savings Bank, a joint trustee, to recover securities on the value thereof, that was purchased from themselves. This case is reported in 970 Ill. 101.

On Page 442.

Mr. Jones was called as a witness to testify as to the advice he had received in the estate, and the result thereof. Over the objection of the attorney for the estate, he was permitted to testify that, in his opinion, the sum of \$1,237.00 would be a reasonable fee for the advice that he and his firm had rendered to the trust estate. After over the objection of the respondent, Mr. Jones testified not only as to the time that he had spent in the prosecution of this suit, but also as to the time spent by the respondent. It is objected that Mr. Jones could not have any personal knowledge of the time that

3.

other persons spent in the prosecution of this suit. He testified from memory, for there was no book account, or other memoranda introduced in evidence to show the time his associates actually spent in the prosecution, or preparation of the case for trial. We think this evidence was improper.

The basis on which Mr. Hughes gave his opinion that \$15,000.00 would be a reasonable fee for his services, was that by his efforts they had recovered for the trust estate, a sum in excess of \$128,000.00. The corroborative testimony of the other attorneys who gave their opinion as to what they thought would be a reasonable fee for such services in Will County, Illinois, also based their opinion on the assumption that \$128,000.00 had been recovered for the trust estate. Mr. Hughes' testimony was very indefinite in regard to the amount recovered, but the record does not show that \$128,000.00 was recovered for the estate. It will be recalled that the trustees held many securities and notes that had been purchased by the trustees from the bank, but they were not valueless. In fact, in the settlement, the trustees retained securities appraised at \$69,229.41. These securities were in the hands of the trustees before Mr. Hughes entered the litigation. In the settlement in addition to the trustees retaining these securities, they procured \$24,000.00 cash and new securities valued at \$45,425.00, or a total of new assets of \$69,425.00. This should have been the basis on which the attorney's

other persons apart in the prosecution of this case. It is believed that there was no such person, or other person, who produced in evidence to show that the association actually existed in the prosecution of preparation of the case in Illinois. It is believed that this evidence was improper.

The data on which Mr. Hughes made his opinion was

\$12,000.00 would be a reasonable fee for his services, and that on his efforts they had recovered for the estate, a sum in excess of \$12,000.00. The correspondence testimony of the estate of persons who have their opinion as to what they thought was a reasonable fee for such services in Will County, Illinois, also based on the opinion of the assumption that \$12,000.00 was a reasonable fee for the first estate. Mr. Hughes' testimony was very definite in regard to the amount recovered, but his feeling was not based on \$12,000.00 was recovered for the estate. It will be recalled that the trustees held many securities and notes that were not recovered by the trustees from the party, but they were not valuable. In fact, in the settlement, the trustees retained securities at \$50,000.00. These securities were in the hands of the trustees when Mr. Hughes entered the litigation. In the settlement of the estate the trustees retained these securities, they recovered \$50,000.00 cash and new securities amount to \$12,000.00, or a total of \$62,000.00 of \$50,000.00. That should have been the basis upon which the trustees

4.

fees, as far as the value of the property recovered for the benefit of the estate, should have been allowed.

It is our conclusion that under the facts and circumstances in this case, the \$8,750.00 that the Court had heretofore allowed the trustee for attorney's fees, was a reasonable fee for the results obtained, and the time actually shown to have been spent by the attorney engaged in the preparation and trial of the case. There is no evidence to support the Court's order allowing the additional fee of \$1,250.00.

The Judgment of the Trial Court is hereby reversed.

Judgment Reversed.

fees, as far as the value of the property involved for the benefit of the estate, should have been allowed.

It is our conclusion that under the facts and circum-

stances in this case, the \$2,000.00 that the Court had previously allowed the trustee for attorney's fees, was a reasonable fee for the results obtained, and the time and effort expended to have been spent in the attorney's office in the preparation and trial of the case. There is no evidence to support the Court's order allowing the additional fee of \$1,500.00.

The judgment of the trial Court is hereby reversed.

Respectfully,
 J. Edgar Hoover

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1942.

Term No. 42Fl9

Agenda No. 6.

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

v.

ELIHU TOTTEN and MABEL
TOTTEN,

Plaintiffs in Error.

Writ of Error
to the Circuit
Court of
Effingham
County,
Illinois.

CULBERTSON, J.

315 I.A. 671

This cause was originally taken by Writ of Error from the Circuit Court of Effingham County, to the Supreme Court of this State, and was transferred to this Court for determination.

ELIHU TOTTEN and MABEL TOTTEN (hereinafter called defendants) were tried under an indictment charging them with burglary and grand larceny, and were convicted of the crime of petit larceny in a trial by jury. The Court sentenced the defendant MABEL TOTTEN to the county jail for a period of one hour and to pay a fine of \$100.00 and one-half of the costs of prosecution. The defendant ELIHU TOTTEN was sentenced to the Illinois State Farm at Vandalia for a period of one year and was assessed a fine of \$100.00 and one-half of the costs of prosecution.

The indictment had been returned on October 22, 1940 and the case was called for trial on April 23, 1941. After the case had been called for trial and the prosecuting attorney had announced his readiness to proceed, the defendants filed a motion to suppress and return certain evidence, being two calves which the defendants were charged with having stolen, and a pair of shoes belonging to the defendant Elihu Totten, which was then in the possession of the sheriff



of Effingham County. The Trial Court heard testimony on the motion to suppress the evidence at that time, which testimony was offered by defendants. None was then offered by the State. The motion as to the calves was not allowed, but the Court below indicated that he was in doubt as to the shoes and apparently made a docket notation to the effect that such evidence would not be considered. After the jurors had been examined and the hearing of the evidence had commenced, the States Attorney requested permission to offer additional evidence in opposition to the motion to suppress, and during a noon recess, before the State had concluded its evidence, such testimony on the motion to suppress was heard out of the presence of the jury. After hearing such testimony, the Court stated that he had been considering the question of the motion to suppress the evidence and that after hearing such testimony, he had concluded to deny the motion to suppress as to the shoes. The State then proceeded with its case and the shoes in question were admitted in evidence. They were not exhibited before the jury, nor were they referred to by the prosecution before the Court had denied the motion.

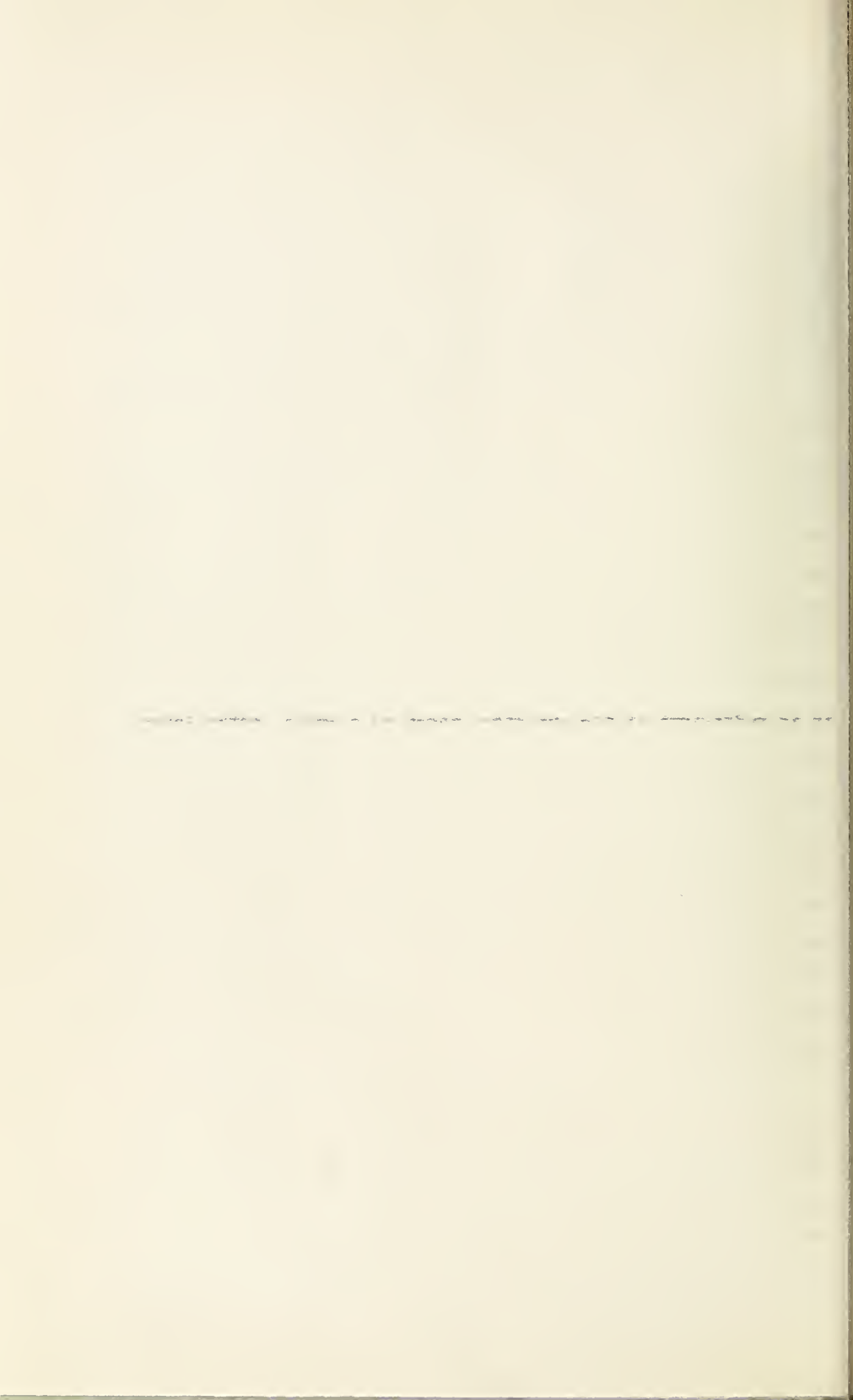
The evidence disclosed that two calves had been taken from a farm lot of one August Niebrugge on the night of September 14, or the early morning of September 15, 1940. A number of footprints were found along the side of the roadway at the same time, near the shed where the calves were kept, consisting of men's footprints with a peculiar heel imprint, and a woman's medium high heel. The calves in question were seen at the Totten farm on the morning of September 15, and three days later the calves were found in the barn of defendant Elihu Totten by the sheriff. They were retaken by the owner on the following day. The evidence also showed that on the night of September 14 and the early morning of September 15 the defendants were in a tavern in Sigel, about fifteen miles from the Niebrugge place, until 2:00 or 2:30 a.m., and that they arrived at their home at about 3:30 a.m. Both defendants testified that they were in the company of each other during the entire time, until they returned to their home.



Elihu Totten explained the possession of the calves in question by stating that they were delivered to him to be raised on shares, on the morning of September 15, 1940, a Sunday morning, by an unknown truck driver, as a result of previous arrangements made by him with a livestock dealer in the vicinity, who had died several months prior to the trial. A sheriff who testified at the trial disclosed that while Elihu Totten was in custody, he was present at a conversation between Totten and the deceased livestock dealer, during which the livestock dealer emphatically denied to Totten that Totten had received the calves from him, and Totten remained silent at such accusation. Totten had also given what might be taken as varying explanations of his possession of the calves to sheriffs and a deputy sheriff, after his arrest.

During the course of the trial a sandbox was brought into court for the purpose of giving a demonstration of the design left by the heel prints of the shoes which were offered in evidence, but such demonstration was not made after defendants objected thereto. No objection was made to the exhibition of the sandbox before the jury, but only to the giving of the demonstration. After the Trial Court had indicated that he would not suppress the evidence as to the shoes, counsel for defendants made a motion for a mistrial, contending that they were deprived of the right to examine jurors on their voir dire and to cross examine witnesses for the people on this question. The Court denied such motion. The evidence offered on behalf of defendant Elihu Totten was to the effect that on the night in question he was wearing a pair of slippers and that he hadn't been able to wear a pair of shoes for several weeks prior to that time, and during the two or three weeks after that time, when he was confined in jail.

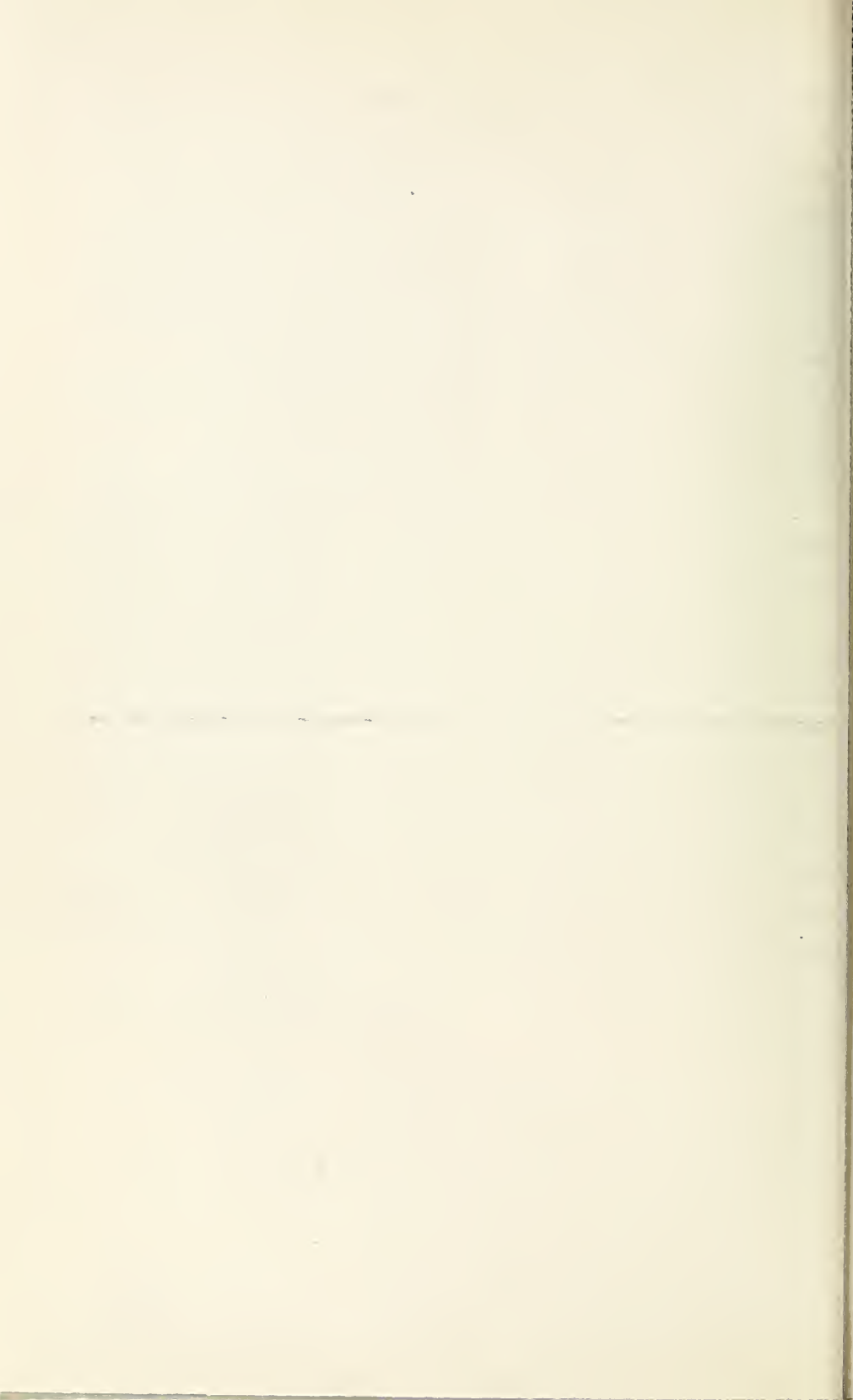
Defendants rely for reversal in this case (in addition to general contentions of error in admission of evidence), upon the rulings of the Court on the motion to suppress the evidence and the motion for a mistrial, and upon the exhibition of the sandbox in the presence of the jury, and the giving and refusing of certain instructions in the case. We do not believe it is necessary to discuss in



detail all of the matters raised by the defendant Elihu Totten. It is sufficient to state as to the motion to suppress the evidence that while such application should be timely and made before the beginning of trial, if such hearing is had the question of the legality of the seizure must be fully heard (PEOPLE v. BROCCAMP, 307 Ill. 448; PEOPLE v. CASTREE, 311 Ill. 392). We feel there is no reversible error in the conduct of the Trial Judge in the determination of such motion and in the manner in which the evidence thereon was heard.

As to the case against Elihu Totten, the Supreme Court of this State has ruled a number of times that where a defendant's possession of stolen property is recent after the theft and there are no attendant circumstances or other evidence to rebut the presumption or create a reasonable doubt of guilt, the fact of possession will warrant a conviction (PEOPLE v. ADAMEK, 354 Ill. 551; PEOPLE v. MIZZANO, 360 Ill. 446). Circumstantial evidence may be sufficient to sustain a conviction, and each circumstance in a chain of circumstantial evidence need not be proven beyond a reasonable doubt, but it is sufficient if the evidence, taken as a whole, establishes guilt (KOSSAKOWSKI v. PEOPLE, 177 Ill. 563). The possession of the calves by the defendant Elihu Totten, the stories which he told to the arresting officers, and the evidence concerning the shoes, all taken together, in view of the facts and circumstances in the record, were sufficient to sustain the conviction. The evidence of footprints and their correspondence with defendant's shoes, was competent, although not by itself of any independent strength, and was admissible with other proof as tending to make out a case (CARLTON v. PEOPLE, 150 Ill. 181).

It appears from an examination of the record that the defendant Elihu Totten has had a fair trial, under the law, and that the errors complained of could not reasonably have affected the result of the trial. Under such circumstances, the judgment of the Trial Court should be affirmed (PEOPLE v. BOLTON, 365 Ill. 39). A judgment of conviction in such cases will not be reversed for slight errors contained in the instructions given, when such instruc-



tions, as a series, fairly present the law in the case to the jury, as is true in the instant case (FLANNAGAN v. PEOPLE, 214 Ill. 170), and where the error complained of in instructions could not reasonably have affected the result of the trial (PEOPLE v. LLOYD, 304 Ill. 23).

Other errors relating to the exhibition of the sandbox and the supposed misconduct of the prosecuting attorney, cannot be reviewed when there is no objection made on such specific grounds at the time of trial (PEOPLE v. RUBEN, 366 Ill. 29). Such matters as are not set forth in the motion for new trial are waived by the defendant (PEOPLE v. VICKERS, 326 Ill. 290).

It is the conclusion of this Court, therefore, that the judgment of the Trial Court as against defendant Elihu Totten should be affirmed.

We have examined the record, however, as to the defendant Mabel Totten and find no evidence upon which a conviction of petit larceny could be sustained as against her. The mere fact that she testified to the effect that she was with Elihu Totten during all of the time that it is suspected that the calves may have been taken, does not of itself justify a conviction as against her. The judgment of the Trial Court as to Mabel Totten is, therefore, reversed, and the Circuit Court of Effingham County, Illinois, is directed to discharge the said defendant Mabel Totten, and to vacate the judgment against her in this cause.

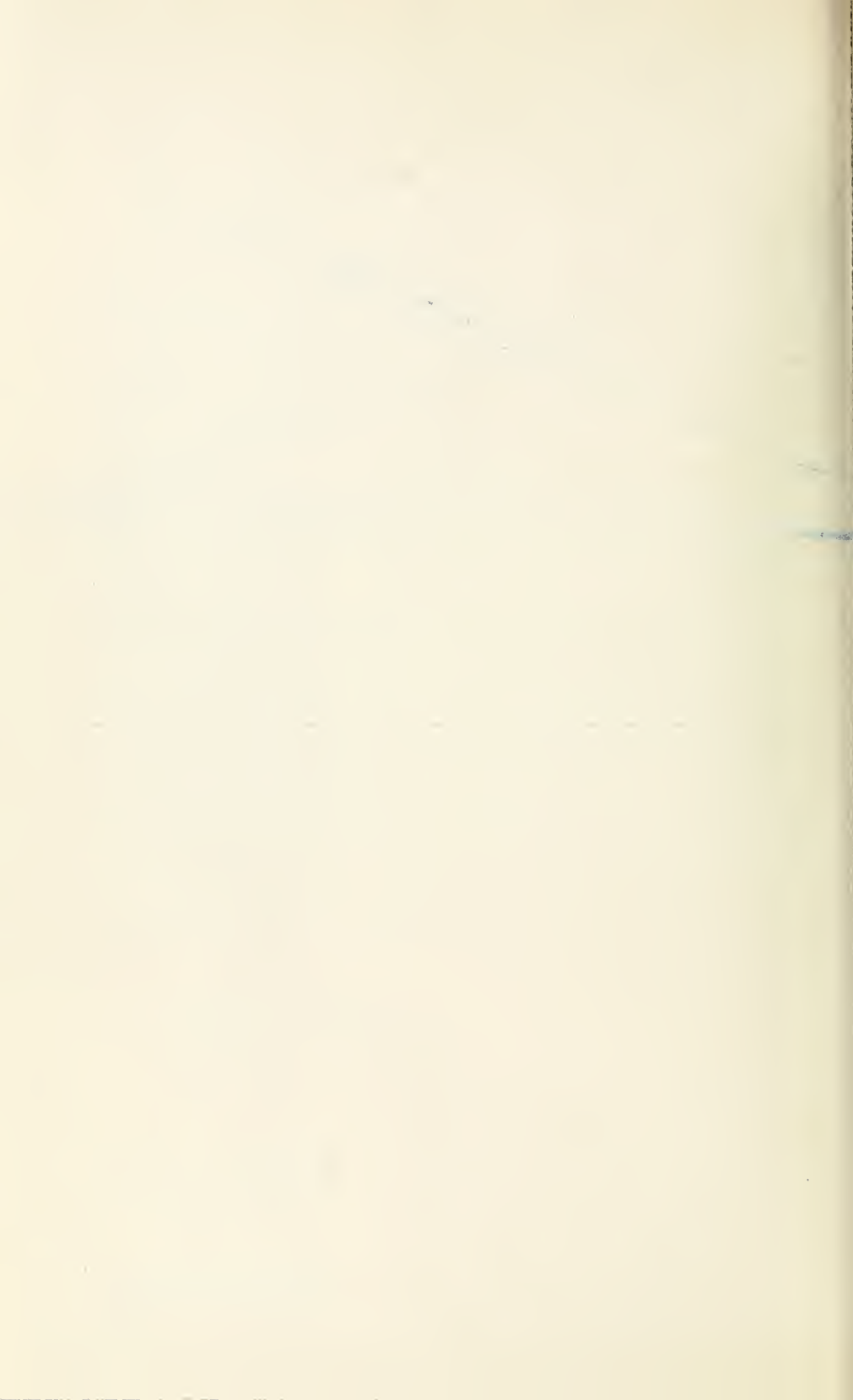
Affirmed as to Elihu Totten.

Reversed as to Mabel Totten.

FILED

JUN 27 1942

David P. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



Abstract

STATE OF ILLINOIS
APPELLATE COURT
May Term, A. D. 1942

9628
210

Term No. 42F27

Agenda No. 7

PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error,)

-vs-

ROLSTON SMITH,)

Plaintiff in Error.)

Writ of Error to

Circuit Court of

St. Clair County.

DADY, J.

315 I.A. 871²

Defendant Rolston Smith was tried before the judge of the circuit court of St. Clair County without the intervention of a jury, on an indictment which charged him with assault with a deadly weapon, to-wit, a knife, with an intent to inflict a bodily injury upon the person of Ed. Hotz. He was found guilty and sentenced to six months confinement at the Illinois State Farm at Vandalia and to pay a find of \$25.00 and costs. He has sued out a writ of error to review such judgment.

The defendant, with his wife and three small children, lived in the Village of Washington Park. About midnight on June 20, 1941, while intoxicated, he "ran" his family out of his house; the family fled to the home of a neighbor two houses distant, followed by defendant who broke the fastening of a screen door in trying to enter therein. The neighbor called the police station and told a member of the fire department, who answered the phone, that the defendant was intoxicated and "acting like a maniac;" the fireman communicated this information to a patrolman who summoned to his assistance three deputy sheriffs, viz. Hogan, Henry and Hotz. The four officers drove to the home of defendant and saw him standing in front of another house talking in a loud voice to a woman inside the house. His shirt tail was out, he wore no hat and appeared to be and

THEORY OF THE
EARTHQUAKE
AND THE
EARTH'S CRUST



The theory of the earthquake and the earth's crust is a complex subject, involving the study of the forces that shape the earth's surface and the internal structure of the planet. The study of earthquakes is particularly important, as they are one of the most powerful natural forces on the earth's surface. The theory of the earthquake and the earth's crust is a complex subject, involving the study of the forces that shape the earth's surface and the internal structure of the planet. The study of earthquakes is particularly important, as they are one of the most powerful natural forces on the earth's surface.

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was intoxicated. The officers shouted to him that they were police officers and flashed their flash light upon him, and told him to stop, that he was under arrest, but he called the officers vile names and then ran into his own home. The officers then went on the rear porch, announced they were police officers and commanded him to come out. One of the officers testified that the defendant then called the officers some vile names and said, "Come on in after me if you want me, I am not coming out and you better not come in." Another officer testified that the defendant said, "Come in and get me." Hotz then pulled the door open and entered the house. It was a screen door and not fastened. In arresting the defendant a scuffle ensued between Hotz and defendant. During all this time there were no lights in the house. Hogan testified that as he and his companions struggled with the defendant something fell on the floor, that he picked the object up and it was an open pocket knife. When the lights were turned on it was discovered that the throat of Hotz had been cut from his left ear to the center of his throat, and that he was also cut in the stomach and side. The next day at the sheriff's office Smith admitted that the knife was his, but said he was so drunk he did not know what happened.

On direct examination the defendant testified that he did not invite the officers into the house, but on cross examination he testified he did not remember whether he did or did not invite them in.

Defendant does not contend that the evidence, if competent, does not justify the judgment, but his only contentions are that the trial court erred in denying his motion to suppress evidence and in admitting the knife in evidence.

Defendant's verified petition to suppress evidence, filed before the trial court, stated that the officers did not have a warrant for his arrest and did not have any search warrant; that the officers, without his permission, forcibly opened the door of his dwelling house and forcibly entered the house; that the defendant had not committed any crime in the presence of the officers; that the



officers forcibly seized hold of the defendant and took him to jail and forcibly took possession of the pocket knife in question. The petition alleged that such entry was an illegal entry and unreasonable search of his dwelling house and person, and prayed that the prosecution on the trial be prohibited from introducing into evidence any property found by the officers during such search of defendant's home and person, and from describing in evidence any facts said officers learned in said search and seizure.

The trial court reversed its ruling on the petition until the conclusion of the evidence, at which time the trial court denied the petition.

The undisputed facts show that the defendant, immediately prior to his arrest and at the time of his arrest, was intoxicated, and the officers saw him in an intoxicated condition. The evidence further shows that immediately prior to his arrest the defendant was guilty of disorderly conduct. In our opinion the undisputed evidence shows that the officers had reasonable grounds to believe and evidently did believe that the defendant was drunk and guilty of disorderly conduct. In fact some of such disorderly conduct was in the presence of the officers. This being so the officers not only had the right to, but it was their duty to arrest him, and they were justified in arresting and searching him without waiting to get a warrant either for the arrest or search. (People v. David, 354 Ill. 168; People v. Swift, 319 Ill. 359.) The seizure of the knife by the officers was merely incidental to the arrest and as such was a lawful seizure. (People v. Davis, supra.)

In our opinion, there was no search involved in the transaction. A search implies a prying into hidden places for that which is concealed, and it is not a search to observe that which is open to view. (People v. Marvin, 358 Ill. 426.)

We do not consider it necessary to pass upon or discuss the question of whether the officers had the lawful right to make such entry. Assuming they did not have such right, and that in making such arrest the officers were exceeding their authority, never-

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theless the defendant had no right to use any more force than appeared to him in good faith to be reasonably necessary in repelling the assault involved in the unlawful arrest. In 6 C. J. S. page 949 it is said: "Accordingly, a person illegally arrested cannot shoot the officer or use a deadly weapon in resisting the arrest unless he has reasonable grounds to believe that he is about to be killed or receive serious bodily injury, and he in good faith acts on this reasonable apprehension."

It is our opinion that the trial court did not err in denying the motion to suppress, and did not err in the admission of the evidence sought to be suppressed.

Affirmed.

FILED

JUN 27 1942

David J. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



42193

COMMERCIAL ENGRAVING COMPANY,

Plaintiff-Appellant,

v.

ARTHUR C. CIMAGLIA,

Defendant-Appellee.

59
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO
188

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

315 I.A. 672

On June 22, 1932 a judgment for \$209.83 was entered in the Municipal Court of Chicago for plaintiff and against the defendant. On December 5, 1940 plaintiff filed its statement of claim in the same court, praying that the judgment be revived. This statement of claim recited the recovery of the judgment on June 22, 1932 in the sum of \$209.83 plus costs; that the judgment was in full force and effect in the sum of "\$200.83" and that there was due thereon from the defendant to the plaintiff the sum of \$200, with interest at 5 percent per annum from the date it was rendered. Another part of the statement of claim form has a notation that the amount claimed is \$400. The summons was returnable on December 16, 1940. On December 14, 1940 an attorney named John Venetucci filed an appearance and a jury demand for the defendant. On December 17, 1940 plaintiff's attorney served a written notice on defendant's attorney that on the following day he would appear before a certain judge in the Municipal Court of Chicago and move for an order that the judgment of June 22, 1932 in the sum of \$209.83 be revived. On December 18, 1940 the attorney for plaintiff filed an affidavit deposing that he was the agent and attorney of record for the plaintiff and had been since June 22, 1932; that he had full charge of the proceedings; that no part of the judgment had been paid either to plaintiff or to him, and that there was due and owing the sum of \$209.83, plus interest and costs. On December 18, 1940 the court entered a

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GRAND JURY
JANUARY 1, 1900
V.
JAMES E. GILBERT
Defendant-Appellee.

THE PEOPLE OF THE STATE OF ILLINOIS

3151A.672

CRIMINAL

On June 22, 1899, a judgment for \$200.00 was entered in the Municipal Court of Chicago for plaintiff and against the defendant. On December 6, 1900 plaintiff filed his statement of claim in the same court, alleging that the judgment be revived. This statement of claim recited the recovery of the judgment on June 22, 1899 in the sum of \$200.00 plus costs; that the judgment was in full force and effect in the sum of \$200.00 and that there was due thereon from the defendant to the plaintiff the sum of \$200, with interest at 6 percent per annum from the date it was rendered. Another part of the statement of claim sets out a notation that the amount claimed is \$200. The summons was returnable on December 12, 1900. On December 12, 1900 an attorney named John Ventresca filed an appearance and a jury venire for the defendant. On December 17, 1900 plaintiff's attorney served a written notice on defendant's attorney that on the following day he would appear before a justice of the peace in the Municipal Court at Chicago and move for an order that the judgment of June 22, 1899 in the sum of \$200.00 be revived. On December 18, 1900 the attorney for plaintiff filed an affidavit deposing that he was the agent and attorney of record for the plaintiff and had been since June 22, 1899; that he had full charge of the proceedings; that no part of the judgment had been paid either to plaintiff or to him, and that there was due and owing the sum of \$200.00 plus interest and costs. On December 18, 1900 the court entered a

judgment reviving the previous judgment in the sum of \$209.83.

On January 9, 1942, approximately 13 months after the judgment was revived, plaintiff filed a statement of claim for the purpose of procuring the issuance of a garnishment summons. This summons was served. On January 12, 1942 the defendant filed a motion to vacate the order reviving the judgment and to quash the execution and garnishment summons, and to place the case on the civil jury calendar for a trial of the issues. This motion was made under Rule 69 of the Municipal Court of Chicago that "all errors of fact committed in the proceedings of this court, and which, by the common law, could have been corrected by the writ of error coram nobis, may be corrected by this court upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice." In support of the motion, defendant presented a verified petition reading:

"Your petitioner, Arthur C. Cimaglia, respectfully represents unto the Court as follows:

"1. That he is the defendant in the above entitled cause and that on, to-wit: June 22, 1932, an ex parte judgment was entered against him in the above entitled cause in the sum of \$209.83; that about on December 10, 1940, your petitioner was served with a copy of summons and statement of claim for revival of judgment for \$200.00, returnable to December 16, 1940, at 9:30 in the forenoon in Room 1109 City Hall in the above entitled cause;

"2. Your petitioner is informed and believes that Rule 14 of the Municipal Court provides that when an appearance is made in writing otherwise than by filing a pleading or motion, the defendant shall be allowed ten (10) days thereafter in which to file a pleading or motion unless the court, for good cause shown, shall otherwise order. And that in an action for the recovery of money not to exceed \$200 the defendant need not file any defense unless ordered by the court to do so, and when in any such case no defense is ordered, the allegations of the plaintiff's statement of claim will be deemed denied, and any affirmative defense may be proved as if it were specifically pleaded; and that table of fees on page 910 of the Municipal Court Manual shows that in 4th class cases not to exceed \$200, no appearance fee is required to be paid by the defendant.

"3. The files in the above entitled cause show that the plaintiff paid the Clerk's office of the Municipal Court of Chicago a filing fee of \$2.00 for the filing of said revival of judgment and that the statement of claim and summons for the said revival of judgment was for \$200.00; that in accordance with the aforesaid Municipal Court Rule 14 your petitioner was not required to file any defense and that in accordance with the aforesaid table of fees your petitioner was not required to pay an appearance fee in said court.

"4. That your petitioner's appearance and the appearance of John Venetucci as his attorney, was filed in the Clerk's Office of the aforesaid Municipal Court on December 14, 1940, together with a jury demand of six jurors and a fee of \$6.00 was then and there paid in said Clerk's Office for said jury as required by the aforesaid table of fees, and your petitioner received a receipt therefor, which receipt

judgment reviving the previous judgment in the case of 1901-02.

On January 11, 1902, respondent filed a motion after the judgment

was reversed, and filed a statement of facts and the grounds

of reversing the judgment of a permanent injunction. This motion was

granted on January 12, 1902, and defendant filed a motion to set

aside the judgment and to grant the execution and satisfaction

thereof, and to place the case on the civil jury calendar for a trial

of the issues. This motion was made under rule 54 of the practice

of the court of Chicago that "all errors of fact committed in the proceedings

of this court, and which, by the common law, would have been reversed

by the writ of error coram nobis, may be corrected by this court upon

motion in writing, made at any time within five years after the date

of final judgment in the case, upon reasonable notice." In support

of this motion, defendant presented a verified petition reciting:

"Your petitioner, Arthur D. Cummings, respectfully represents

that the facts are as follows:

"1. That he is defendant in the above entitled cause and

that on, to-wit: June 12, 1901, an ex parte judgment was entered against

him in the above entitled cause in the case of 1901-02; that about

December 10, 1901, your petitioner was served with a copy of a writ

and statement of claim for revival of judgment for 1901-02, returned

to plaintiff, to-wit: 1901, at 1901 in the term then in session in

the above entitled cause;

"2. That your petitioner is indebted and believes that he is

of the National Bank, and that when so indebted he was in

possession of the same when he was indebted to the National Bank

and that he is now indebted to the National Bank in the sum of

\$100.00, and that he is now indebted to the National Bank in the sum of

\$100.00, and that he is now indebted to the National Bank in the sum of

\$100.00, and that he is now indebted to the National Bank in the sum of

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\$100.00, and that he is now indebted to the National Bank in the sum of

\$100.00, and that he is now indebted to the National Bank in the sum of

your petitioner is ready to and will produce at the hearing hereof.

"5. That the record sheet known as half sheet number 3 in the files of the above entitled cause shows as follows, to-wit: December 13, 1940, defendant, Arthur G. Cimaglia, defaulted, personal service of sci. fa. Judgment on default on sci. fa. Judgment of May 12, 1932 Vs. defendant Arthur G. Cimaglia for \$209.83 revived and where as costs and part of former judgment have been paid judgment Vs. defendant, Arthur G. Cimaglia, for Two Hundred (\$200.00) Dollars and interest from this date with costs of sci. fa.

"6. That the files in the above entitled cause also show that on December 17, 1940 plaintiff's attorney served a notice upon your petitioner's said attorney, John Venetucci, stating that plaintiff's attorney would appear before the motion court in Room 809 City Hall in the forenoon on December 18, 1940, and move the court for an order that the judgment entered June 22, 1932 in the sum of \$209.83 be revived in the sum of \$209.83, in accordance with the statement of claim filed December 5, 1940.

"7. That the files in the above entitled cause also show that plaintiff without notifying your petitioner or his aforesaid attorney presented and filed an affidavit in the above entitled cause on December 18, 1940, which affidavit states as follows: 'Harry H. Kaplan, being first duly sworn on oath deposes and says that he is the duly authorized agent and attorney of record for the plaintiff, Commercial Engraving Co., a corporation in the above entitled matter; that he has been attorney of record since entry of judgment on the 22nd day of June, 1932; that he has had full charge of the proceedings hereunder and that no part of said judgment has been paid since its entry; nor has any payment been made direct to the plaintiff. This affiant further states that there is due and owing under the judgment heretofore entered the sum of \$209.83 and costs, with interest. This affiant further sayeth not. (Signed) Harry H. Kaplan.' and acknowledged before Arnold E. Kabaker, a Notary Public.

"8. That the aforesaid record sheet known as half sheet number 3 in the files of the above entitled cause also shows as follows: 'December 18, 1940, motion of plaintiff to vacate default and scire facias judgment of December 13, 1940, On motion of plaintiff finding the issues vs. defendant Arthur G. Cimaglia, for Two Hundred and nine 83/100 dollars and judgment on finding on scire facias judgment of June 22, 1932 vs. defendant Arthur G. Cimaglia, for two hundred and nine and 83/100 dollars revived for full amount with costs of both proceedings.'

"9. That your petitioner after a diligent search is unable to locate the address of his said attorney, John Venetucci; that the above entitled cause appeared in the Civil Jury Trial Calendar as Calendar number 376 under Calendar 1 to be called for trial in Room 1112, City Hall, that Calendar number 367 was the highest number reached on said Calendar in Room 1112 for November 26, 1941, and that Calendar number 379 on said Calendar 1 was the highest number reached in Room 1112 for November 27, 1941, but Calendar number 376 on said Calendar 1, the above entitled cause did not appear in the Municipal Court Record as being included in said last mentioned call of cases being reached on the 2nd block for November 27, 1941; that your petitioner with his present attorney, John A. Ulrich, called at said court room 1112, City Hall, November 27, 1941, and was informed by the Clerk in said court room that said case under Calendar number 376 on Calendar 1, was scratched off his Calendar and would not be called for trial because the files showed there had been a revival of judgment entered December 18, 1940, which was the first information your petitioner had that a revival of judgment had been entered herein; that said files also show that an Execution issued thereon but same was never served upon your petitioner; that said files also show that a writ of garnishment issued on said Execution returnable January 5, 1942, in court room 910, City Hall, and is still pending herein;

"10. That the aforesaid revival of judgment for \$209.83 and finding on scire facias entered on December 18, 1940 was irregular

[illegible]

and contrary to the procedure and Rules of the Municipal Court and that an injustice has been done your petitioner, the defendant herein, because of the errors appearing in the proceedings in the above entitled cause whereby the ad damnum was \$200.00 and the aforesaid affidavit filed herein by plaintiff's attorney, Harry H. Kaplan, on December 18, 1940, states that \$209.83 is the amount due the plaintiff, which amount changed the class and character of the case requiring the defendant to pay an appearance fee of \$2.00 and said affidavit is based on said attorney's conclusion and not on his personal knowledge and erroneously stated \$209.83 as the amount due the plaintiff and failed to state that said revival of judgment was filed for \$200.00 and thereby misled the motion court to believe that the defendant was in default for his failure to pay an appearance fee of \$2.00; where as a matter of fact the amount of the revival of judgment sued on was for \$200.00 and therefore no appearance fee was required to be paid by the defendant; and that defendant was not indebted to the plaintiff in any sum whatsoever because on August 14, 1939 the defendant having paid plaintiff said judgment; and the defendant was then and there in good standing and not in default and was entitled to have the issues herein tried before a jury according to the regular procedure and Rules of the Municipal Court; that said affidavit of plaintiff's attorney misinformed the court as to the facts of the case; that by depriving defendant of a jury trial which he had demanded and paid for while the defendant was in good standing under the rules of this court was inconsistent with substantial justice and constituted errors of fact committed in the proceedings of this court in the above entitled cause which should be corrected by this court under Rule 69.

"Wherefore, your petitioner, the defendant herein, prays that the aforesaid judgment and finding on scire facias entered herein on December 18, 1940, reviving judgment of June 22, 1932, against your petitioner, the defendant herein, be vacated and set aside and held for naught and that the Execution issued thereon be quashed and that the garnishment and summons be quashed, and that your petitioner be given a trial by jury on the issues herein in the regular way according to the established procedure and rules of the Municipal Court of Chicago, as originally demanded and paid for by him."

On January 12, 1942 the court allowed the prayer of the petition, to reverse which this appeal is prosecuted.

It will be observed that the petition admits that on December 17, 1940 plaintiff's attorney served a notice upon defendant's attorney that the former would appear before the court on the following day and move for an order reviving the judgment theretofore entered in the sum of \$209.83. The record shows that on December 18, 1940 the judgment was revived. The record is silent as to whether John Venetucci, attorney for defendant, appeared. Defendant would be entitled to a jury trial to determine any issue of fact raised. The presumption is that the court acted in accordance with the law. The purpose of the motion in the nature of a writ of error coram nobis is to correct errors of fact which did not appear of record at the time of the entry of judgment, and which if known to the court would have prevented the entry of the judgment. The court, having the record before it, knew that the defendant demanded a jury trial. A

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proceeding to revive a judgment is usually heard soon after it is filed. As a general rule, no issue arises. If an issue does arise, it is usually one that can be disposed of without a long trial. The petition indicates that Mr. Venetucci cannot be found. A lawyer will ordinarily perform his duty. Presumably, he appeared and was not able to submit a defense, or, recognizing that he did not have a defense, did not appear. The petition asked that the judgment order reviving the judgment be vacated and that the defendant be given a trial by jury on the issues joined. We have diligently examined the petition in order to ascertain what issue is raised by the defendant. He admits that the original judgment was entered and that his attorney filed his appearance in the instant case wherein the last judgment was entered. The only attempt to state a defense that we can discover appears in the statement "that defendant was not indebted to the plaintiff in any sum whatsoever because on August 14, 1939 the defendant having paid plaintiff said judgment." This is a mere recital by way of innuendo that the judgment was paid without any positive averment that it was paid. At the time the judgment of December 18, 1940 was entered reviving the previous judgment, the court had jurisdiction of the subject matter and of the parties, and due notice was given to the attorney of record of the defendant that plaintiff was asking for the entry of the judgment. If the court committed error in entering the judgment, defendant could have appealed. The fact that the court proceeded to hear the case and entered judgment without impaneling a jury, might be error. It cannot be said, however, that the court did not know that the defendant had asked for a jury trial.

Defendant urges that the sufficiency of his motion was not raised in the trial court by some proper mode to test the validity thereof, and that hence no question of law or fact was raised for this court to pass upon. He also points out that a motion or petition in the nature of a writ of error coram nobis stands as a complaint or statement of complaint in a new suit. The motion supported by the petition was presented to the court on January 12, 1942, and the court ruled

proceeding to receive a judgment is usually made some time in the
 future, in a general way, on some basis. It is not until after the
 trial is usually one that can be disposed of without a trial. The
 position indicated that the defendant cannot be tried, a judgment
 will ordinarily be made by the jury. Presumably, the question was not
 not able to make a decision, or, recommending that the defendant be
 before, did not agree. The position was that the defendant was
 twelve the judgment be made and that the defendant be given a
 trial by jury on the issues before. To have a judgment made by the
 position in order to determine what issue is raised by the defendant.
 To make that the original judgment was made and that the defendant
 filed his statement in the district court within the time specified in
 the rule. The only way to state a defense that an one otherwise is
 made in the statement that defendant was not intended to be tried.
 first in any way and never before on March 14, 1911, and the
 having paid finally with judgment. This is a case decided by the
 judgment that the judgment was paid without any further payment and
 it was paid. At the time the judgment of November 14, 1910, was entered
 reviewing the previous judgment, the court had jurisdiction in the case
 that matter was at the time, and the court was given in the statement
 of record of the defendant that judgment was made in the way of
 the judgment. If the court wanted more to support the judgment,
 defendant could have appealed. The fact that the court proceeded to
 hear the case and entered judgment without introducing a jury, which is
 wrong. It would be well, however, that the court did not have the
 the defendant had made out a jury trial.
 defendant agrees that the judgment in the matter was not
 related to the trial by any answer made in any way the validity
 thereof, and that there is question of law on this and related to this
 court to pass upon. We also have not made a motion or petition in
 the nature of a bill of error which stands as a petition for
 statement of judgment in a new trial. The motion supported by the
 than was presented to the court on January 11, 1911, and the court ruled

6.

on it forthwith. The better practice would be for the court to require plaintiff to plead to the petition. Plaintiff could then move to strike the petition, or answer it. In this case the court allowed the petition without requiring a motion to strike or an answer. We have taken the allegations of the petition as true, except where they are contradicted by the record, or where they state conclusions of law or conclusions of fact not supported by specific statements of fact. In our opinion, the petition presented is insufficient.

For the reasons stated, the order of January 12, 1942 vacating the judgment of December 12, 1940 and quashing the execution and garnishment summons, is reversed.

ORDER REVERSED.

HEBEL, J, and KILEY, J, CONCUR.

on its behalf. The latter practice would be for the court to refuse to strike the petition, or answer it. In this case the court should have taken the allegations of the petition as true, except where they are contradicted by the record, or where they state matters of law or conclusions of fact not supported by specific statements of fact. In our opinion, the petition presented is insufficient.

For the reasons stated, the order of January 15, 1925, reversing the judgment of November 18, 1924, and granting the writ of habeas corpus, is reversed.

REVEREND JUSTICE.

REVEREND JUSTICE, J. and KIMBLE, J. CONCUR.

Abstract

GEN. NO. 9780

AGENDA NO. 6

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1942.

CHICAGO TITLE AND TRUST COMPANY,
A CORPORATION, AS SUCCESSOR
TRUSTEE, ETC.,
APPELLEE,

vs.

RICHARD F. PIETSMAN, ET AL.,

* * * *

CAROLINE LOTT,

APPELLANT,

vs.

ALBERT J. PETERSON AND
MARLEY HALVORSEN, ETC.,

APPELLEES.

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY.

315 I.A. 672²

HUFFMAN, P. J.

The Chicago Title and Trust Company, as successor trustee under a trust deed, brought a suit in foreclosure against certain property located in the city of Waukegan. The trust deed had been given to secure the payment of a \$30,000, bond issue against the property. Decree for foreclosure was entered, and the property offered for sale thereunder by the master. The high bid was made by Mildred Moore, a stranger to the proceedings. It was in the amount of \$16,260. Appellees, representing the

CHICAGO, ILL.

GEN. NO. 210

IN THE CIRCUIT COURT OF THE

SECOND JUDICIAL DISTRICT

AT CHICAGO, ILL.

CHICAGO TITLE AND TRUST COMPANY,
PLAINTIFF,
vs.
RICHARD L. FRIEDMAN, ET AL.,
DEFENDANTS.

ARJAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY.

COMING INTO

RECEIPT

vs.

ALBERT J. FRIEDMAN AND
HARRY FRIEDMAN, ET AL.,
DEFENDANTS.

APPLIES.

CHICAGO, ILL.

The Chicago Title and Trust Company, as assignee,
trustee under a trust deed, brought a suit in foreclosure
against certain property located in the City of Chicago.
The trust deed was given to secure the payment of a
\$30,000 bond issued against the property. Before the
foreclosure was entered, and the property offered for
sale thereunder by the master, the right had been made
by Alford Moore, a stranger to the proceedings. It was
in the amount of \$10,000. Alford Moore, before the

bondholders, filed their objections to the sale, based upon alleged gross inadequacy of price, and asked that the report of sale be not approved.

Appellant, Caroline Lott, as owner of the equity of redemption, filed her answer to appellees' objections to confirmation of the sale. After a hearing, the court made a finding that the sale price, reported by the master, was grossly inadequate; that the property possessed a far greater value and could be sold for a substantially higher price. The objections to the report of sale were sustained, and approval thereof denied. The master was ordered to advertise the premises for another sale. Caroline Lott brings this appeal from the above order.

The chancellor has a broad discretion in approving sales by the master. The bidder is considered as having "only made an offer to buy, subject to the approval of his offer by the court, and he bids with that condition, ***. Sales by masters are not sales in a legal sense, until they are confirmed. Until then, they are sales only in a popular sense. The accepted bidder acquires no independent right to have his purchase completed, but remains only a preferred proposer until confirmation of the sale by the court, as agreed to by its ministerial agent. Confirmation is final consent, and the court, being in fact the vendor, may consent or not, in its discretion." *Levy v. Broadway-Carmen Bldg. Corp.*, 366 Ill. 279, 286. (Also *Rorer on Judicial Sales - Confirmation* - p. 55 et seq. 2 ed.) "Confirmation is final consent, and the court being in fact the vendor, may consent or not, in its sound judicial discretion. This discretion, unless abused, will not be interfered with by a court of review." *Shultz*

bonholders, list their objections to the sale, and then
alleged gross negligence of the master, and asked that the report
of sale be not approved.

Appellant, Caroline Porter, on answer to the report of
requisition, filed an answer to appellant's objections to con-
firmation of the sale. After a hearing, the court made a
finding that the sale price, reported by the master, was grossly
inflated; that the property possessed a far greater value and
could be sold for a substantially higher price. The objection
to the report of sale was sustained, and approval thereof
denied. The master was ordered to ascertain the proper price
and resell the property. Caroline Porter was allowed her costs
and order.

The chancellor has a broad discretion in approving sales
by the master. The bidder is considered as making a bid, and
an offer to buy, subject to the approval of the officer of the
court, and he bids with that condition. Sales by masters
are not sales in a legal sense, until they are confirmed. Until
then, they are sales only in a popular sense. The accepted bidder
acquires no independent right to have his purchase completed,
but remains until a confirmed purchase is made subject to the
sale by the court, as agreed to by the judicial officer. Con-
firmation is final to both the court and the bidder. In the absence
of a confirmed sale, the court may, at its discretion, set aside
the sale, and the court may, at its discretion, set aside the
sale, and the court may, at its discretion, set aside the sale,
or not, in the same judicial discretion. This is a matter of
discretion, and will not be disturbed by an appeal of record.

v. Milburn, 366 Ill. 400, 403. However, the discretion thus vested in a court is not a mere arbitrary one, but must be exercised within the established principles of law, and where the sale has been conducted according to the order of the court, and the purchaser is a stranger to the record, mere inadequacy of price will not justify a court in refusing confirmation of the sale unless such inadequacy is so gross as to shock the conscience of the chancellor, or to amount to fraud. In instances of this kind, each case must be determined by its own circumstances. Moeller v. Miller, 315 Ill. 454, 458, et seq; Rader v. Bussey, 313 Ill. 226, 231, 232.

Evidence before the chancellor fixed the fair cash market value of the property involved at \$34,500. It further disclosed that a party was willing to bid \$4000, more than that of Mildred Moore. The court, in his remarks, stated he desired that equity be done; that it was within the sound discretion of the court to deny approval of the report of sale; and that in the exercise of such discretion, he deemed it just and equitable to deny approval and set such sale aside. He further stated that from his questions to appellant and her attorneys as to whether she was liable for any deficiency judgment, he received the understanding she was not, and therefore, she was not interested in the property selling to the best advantage, like she would be if she were personally liable for a deficiency.

From the trial court's remarks, it is apparent he desired to protect the bondholders, as in the case of Straus v. Anderson, 366 Ill. 426. We are not impressed with the standing of appellees any more than we are with that of appellant, yet in view of the record, we do not feel justified in holding that the chancellor

v. Wilson, 200 Ill. 408. However, the question was

vested in a court of equity and, that was the

exercise within the established principles of law, and there

the sale was conducted according to the rules of the court,

and the purchaser is a stranger to the record, and therefore

of title will not justify a court in retaining jurisdiction in the

sale unless such irregularity is so gross as to amount to a fraud

of the commission, or to amount to fraud. In the absence of such

kind, each case must be determined by its own circumstances. See

v. Miller, 211 Ill. 435, 436, 437; Miller v. Miller, 211 Ill. 435, 436, 437.

Whereas before the commission fixed the fair cash value

value of the property involved at \$51,000. The further disclosed

that a party was willing to bid \$40,000, more than half of which

more. The court, in its opinion, stated that the bid should

be done; that it was within the sound discretion of the court to

deny approval of the report of sale; and that in the exercise of

such discretion, it should be based on facts and not on mere approval

and see such sale again. The court stated that from this question

to appellant and her co-defendants as to whether they were liable for any

deficiency judgment, it resulted that appellant and her co-defendants

therefore, was not interested in the property being sold to her

best advantage, that she would be in the same financial straits

for a deficiency.

From the trial court's report, it is apparent that appellant

protest was considered, as in the case of Miller v. Miller,

200 Ill. 408. It was not necessary for the purpose of the case

and the court was not bound by the report, but by the facts

known, as the trial court's report was not binding.

abused the discretion vested in him. Therefore, the order of the trial court will not be interfered with.

The order of the Circuit Court disapproving the report of sale and ordering a resale, is affirmed.

Order affirmed.

...the director ...
...the trial court will not be ...
...The order of the Circuit Court ...
...sale and ordering a ...
...order ...

315-11-1945

GEN. NO. 9799

AGENDA NO. 21

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1942.

MARIA GRICE, ADMINISTRATRIX OF
THE ESTATE OF DOLORES GRICE,
DECEASED,

APPELLEE,

vs.

PAUL F. O'NEIL, ADMINISTRATOR
OF THE ESTATE OF RICHARD
JACOBSEN, DECEASED,

APPELLANT.

APPEAL FROM CIRCUIT
COURT OF OGLE COUNTY.

32 36

315 I.A. 673

HUFFMAN, P. J.

This is an action by appellee as administratrix of the estate of Dolores Grice, against the administrator of the estate of Richard Jacobsen. The suit is brought for wrongful death. The deceased was riding as a guest passenger in an automobile with Wilbur Reinder, on March 22, 1940. The driver of the car was a young man about eighteen years of age. The deceased was about fifteen years of age. The car in which deceased was riding collided with a car driven by Jacobsen. It was a head-on collision. The accident resulted fatally to plaintiff's intestate, and to Jacobsen. It happened at about nine o'clock at night, on a highway which is commonly designated

IN THE APPELLATE COURT OF THE STATE OF NEW YORK

SECOND DEPARTMENT

JANUARY, A. D. 1911.

MARIA WILSON, ADMINISTRATRIX OF
THE ESTATE OF JOHN W. WILSON,
DECEASED,

APPEALS,

VS.

JAMES F. O'NEILL, ADMINISTRATOR
OF THE ESTATE OF ALICE
O'NEILL, DECEASED,

APPEALS.

APPEAL FROM DECISION
OF THE COURT OF COMMON PLEAS.

8151A.018

1911, N. Y.

This is an action to set aside the verdict in the
the estate of John W. Wilson, against the executor of the
the estate of Alice O'Neill. The suit is brought for
wrongful death. The deceased was killed as a result
of an automobile accident on June 1, 1909, at
22, 1909. The driver of the car was a young man about
eighteen years of age. The deceased was about fifteen
years of age. The car in which deceased was riding
collided with a car driven by deceased. It was a head-on
collision. The accident occurred while the car was
in motion, and the deceased was killed. It is shown by the
evidence that the car in which deceased was riding was
driven at a high rate of speed, and that the deceased
was not wearing a seat belt. It is also shown that the
car in which deceased was riding was not properly
maintained, and that the driver was not properly
licensed. It is further shown that the driver was
intoxicated at the time of the accident. It is
therefore recommended that the verdict be set aside,
and that a new trial be granted.

as a "black top" road, and at a point about five miles east of the village of Polo, in Ogle county.

The complaint consists of two counts. The first count charges ordinary negligence on the part of Jacobsen. The second count charges willful and wanton conduct in the operation of his automobile.

Trial resulted in a verdict for plaintiff administratrix. Appellant brings this appeal from judgment rendered thereon.

Appellant's main contention is directed toward the instructions. Five were given on behalf of appellee. Appellant urges error with respect to each of such instructions. Instruction number three directs a verdict and therefore, should limit the jury to the negligence or to the wrongful conduct charged against the defendant in the complaint. Cases sustaining this rule will be found cited in Carnahan v. Public Service Co., 276 Ill. App. 277, 279; Garnhart v. Reeves, 288 Ill. App. 159, 160. The rule has recently been announced in the cases of Rasnussen v. Wiley, 312 Ill. App. 404, 407, 408; and Gray v. Richardson, 313 Ill. App. 626, 629, 630. No other instruction was given to furnish the jury a guide as to the negligence or wrongful conduct charged in the complaint.

Another unusual situation exists with respect to the charges made in the complaint against the driver Jacobsen. The case was tried and went to the jury on both counts of the complaint. The jury was in no way instructed as to what constituted willful and wanton conduct. The verdict returned was a general verdict of guilty. It is impossible for a court to say what element of negligence or wrongful conduct charged against the defendant, the jury had in mind when it returned

THE ATTORNEY GENERAL, WASHINGTON, D. C.

The applicant consists of two companies, the first company charges ordinary rates for the use of the line. The second company charges a special rate for the use of the line.

Appellant's Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 84

in the case of...

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the verdict. Where a complaint includes counts for negligence and for wrongful and wanton conduct, "the instructions to the jury should clearly and plainly point out the distinction between these causes of action, and unless this is done, confusion is certain to result." *Nosko v. O'Donnell*, 260 Ill. App. 544, 554. There is a fundamental difference and distinction between negligence and willful and wanton conduct. The defenses to the two charges may not be the same. The law governing liability of the parties is not the same, and the damages are not governed by the same rules of law. It has recently been said in the case of *Bezomek v. Panico*, 301 Ill. App. 408, with reference to instructions to the jury on negligence and willful and wanton conduct when both are charged in the same complaint, that, "care should be exercised to explain the difference, so that the jury may properly consider the facts presented in arriving at their decision." (page 415).

For error assigned with respect to instruction directing a verdict without limiting the jury to the negligence or wrongful conduct charged, and without any other instruction to obviate such error, the judgment is reversed and the cause remanded.

Reversed and remanded.

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